January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-2	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	A-
L6133-1	Constitutional Law	Greene, Jamal	4.0	A-
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-10	Legal Practice Workshop I	Izumo, Alice; Spanos, Evie	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 60.0
Total Earned JD Program Points: 60.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	James Kent Scholar	1L

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am pleased to provide my highest recommendation for Kyle Oefelein, my former student and now research assistant, for the position of a judicial clerk. In her roles, Kyle has demonstrated an outstanding blend of diligence, intellect, and practicality that leads to exceptional output. Her easygoing character and wit add to her appeal, making her an enjoyable collaborator. Her assistance in drafting two chapters of my upcoming book was invaluable and solidified my ability to recommend her as a superb hire.

I first got to know Kyle as a student in my corporate law course. While there were over 120 students enrolled in the class, making it difficult to know class participants on an individual basis, it was still clear to me Kyle was dedicated to understanding the material. Throughout the semester, I received emails from Kyle, with insightful questions to check her conclusions as she connected concepts together. This dedication throughout the semester showed through on her final exam, where Kyle was able to demonstrate her deep understanding of the subject through concise application of the law to a complex set of facts, earning a top grade in the course.

While I was happy to see Kyle perform well in the course, I had already asked Kyle to work with me as my research assistant the following semester. Our email exchanges had indicated Kyle was an enthusiastic brilliant student who would make an excellent research assistant. I asked Kyle to help draft two chapters of a book I am in the process of writing. Kyle researched and wrote over 16,000 words, which will be invaluable starting points for my own version of the chapters. Kyle was able to find background material and cases which demonstrated exactly the issues I was aiming to highlight, and present these cases in a clear and compelling writing style. It was clear from the work produced that Kyle understood the big picture of the piece and was focused on bringing together the right information to convey this message to the reader. Her work truly stood out, and I am looking forward to working with Kyle next year as she continues to provide exceptional research assistance.

In conclusion, it is with great enthusiasm that I strongly recommend Kyle for the clerkship position. Her positive attitude and first-rate work product ensure that she will be a great addition to any team. Should you require any additional information, please do not hesitate to contact me. I am happy to provide any further assistance that you may need.

Sincerely,

Zohar Goshen

Zohar Goshen - zohar.goshen@law.columbia.edu - 212-854-0722

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to enthusiastically and wholeheartedly recommend Kyle Oefelein for a clerkship in your chambers. Kyle was a stellar student in Criminal Law; among the nearly 300 1L students I taught that semester, Kyle scored among the top five on the final exam (because of the number of students, the exam consisted of 85 multiple-choice questions). Kyle also attended my office hours regularly, where I got to know her better. Her sharp insights, probing questions, and calm demeanor set her apart. I thought that her maturity, plus her thorough understanding of the materials, would make her an ideal Teaching Assistant, and I was thrilled that she accepted my invitation to serve as a TA in Spring 2023. By all accounts, Kyle was a terrific TA. In addition to being invaluable to the 1Ls, Kyle was indispensable to me. She cleared up many of the 1Ls' questions that my own office hours this past semester were not as crowded as they have been in the past. I wish that I could hire Kyle again for next year!

Kyle is seeking a judicial clerkship for several reasons, one of the most important being that she wants to work in government, in a regulatory or enforcement role that serves to protect consumers. She understands that a clerkship is an important stepping stone towards achieving her career goal. I strongly believe that Kyle would be an excellent law clerk, with her professionalism, analytical skills, and ability to work at a high level in fast-paced settings. Please do not hesitate to reach out to me with any questions. I would be happy to be of further assistance.

Sincerely,

Sarah A. Seo

Sarah Seo - sarah.seo@law.columbia.edu

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Kyle Mary Oefelein for a clerkship with great enthusiasm. She is one of a small number of Columbia's finest students this year; I am pleased to have had her in my classroom last fall and expect you would be equally pleased to have her in your chambers.

I know Ms. Oefelein well, as I had her in my Bankruptcy course and supervised her student note. Oefelein came to my attention quickly in the fall, as she asked a seemingly simple question on the third or fourth day of the semester. But when I considered the question for a moment it was immediately clear that it turned on a subsection of the relevant code section that I'd never read with care, which seemed to apply quite unclearly to her question - about the application of the stay to collective bargaining agreements. I quickly learned that she brought to the course considerable experience in the bankruptcies of large retail companies. Her comments and questions through the semester were a great boon to the course, as they led to colloquies that helped students who were not nearly as prepared as she was to see the implications of the material we were discussing. So I knew early in the semester that I'd found one of the really excellent students. And so at the end of the semester it was no surprise that she'd been the highest scoring second-year student in the course, which is why I've asked her to be my teaching assistant next year.

I also spent quite a bit of time with her on her student note, which you can read for yourself. What I would say is that she took a mass of relatively wide-ranging material and managed to compress it all into a relatively succinct and clearly analyzed framework. As student notes go, it was quite unusual that she had identified a topic of such relative importance in the bankruptcy process (severance pay) on which there is so little written and at the same time such disarray in the lower courts. I learned more from supervising her note than any note I've supervised in the last decade.

I should add a bit more about her personality. She is deceptively cheerful and self-effacing, which at first glance might make you think she is slight. But as I started corresponding with her through the semester I realized that she was a careful and remarkably mature student possessed by the importance of clear and direct analysis. You can see the evidence of the maturity and consistency on her transcript, which doesn't have a single grade below an A-. When I looked back at her resume I started to understand. I could see where she got the background knowledge about retailer bankruptcies (her time at a consulting firm before law school). I also saw the evidence of the work ethic that impressed me so much - four years as a Division 1 cross-country athlete, quite a lot to do while performing so well at Cornell.

Ms. Oefelein truly is one of the very best prospects Columbia has to offer. She would be a joy to have around; I'm looking forward to my fall course with her quite a bit. I hope very much you'll look at her other letters and take a chance talking to her. I am quite sure you will not regret it.

Sincerely,

Ronald J. Mann
Albert E. Cinelli Enterprise Professor of Law

Ronald Mann - rmann@law.columbia.edu - 212-854-1570

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 08, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Kyle Oefelein

Dear Judge Matsumoto:

This is a letter in support of Kyle Oefelein's application for a clerkship. I am not really sure how Kyle came to work as a research assistant on two papers I have recently written. Presumably, I asked if she was interested, but perhaps she inquired whether I had any work that needed researching. She was a student in my Property class in the spring of 2022 and did reasonably well. I recall that she frequently came to office hours and asked sharp questions, which may have led to my enlisting her to do research. In any event, it was a very happy choice. Kyle did excellent work on two papers: one a bit of a departure for me entitled "The Essential Meaning of the Rule of Law," now published in the journal of Law, Economics and Policy, and the other a piece due out any day in the Administrative Law Review entitled "Antitrust Rulemaking: The FTC's Delegation Deficit."

Kyle's work on the Antitrust paper particularly highlights her strengths. Many years ago, I wrote a paper in the Harvard Law Review with Kathryn Watts on the history of legislative rulemaking, which discussed the early history of the FTC and the understanding that it had only the power to conduct adjudications, not to engage in substantive rulemaking. The matter has recently become controversial, with the FTC under the leadership of Lina Kahn claiming that it has the power to issue substantive rules in competition (i.e., antitrust) matters. I presented a paper at a couple conferences reprising the argument of the old Harvard article. But it became clear that the earlier piece did not touch bottom. I asked Kyle to review recent legislative amendments to the original FTC Act, and she uncovered quite a bit of interesting stuff. The 1975 Federal Trade Commission Improvements Act turns out to be perhaps the key event. The text is ambiguous on the relevant point, so I asked Kyle to do a thorough legislative history, something we do not expect our students to have much facility with these days. She unpacked everything quite nicely (it was a big mess, with multiple bills and hearings spread out over several years). Ultimately, I concluded that the 1975 Act merely stipulated that it did not modify the original understanding, at least in competition matters. This may become a critical issue if the matter is litigated, as I suspect it will be. In which case Kyle's research skills may turn out to be an important factor in the development of the law.

Kyle is a superior student by any measure. The "A-" I awarded her is Property is her lowest grade; more commonly she gets an undiluted "A." She is the Managing Editor on the Law Review, and has made good use of her summers, first as an intern with the SDNY U.S. Attorney and then with Wachtell, Lipton. I would also note that she has valuable pre-law school experience in consulting and labor relations, which no doubt helps her to grasp a variety of complex legal matters. Her written work for me has been excellent. Her communication skills are unimpeachable; I always knew where she stood on projects and when to expect her assignments to be completed.

I should also add that Kyle has been unfailingly gracious in all our interactions. All the evidence suggests she would make a terrific law clerk. I recommend her without reservation.

Please feel free to reach out if you have further questions. Email is best until July, since I will be traveling in Europe in June. The address is tmerri@law.columbia.edu.

Sincerely,

Thomas W. Merrill

Thomas Merrill - tmerri@law.columbia.edu - 212-854-9764

KYLE MARY OEFELEIN

212 W. 104th St., Apt 1D, New York, NY 10025 • (949) 728-8193 • kmo2152@columbia.edu

Writing Sample

The following writing sample is an excerpt from my student Note prepared to conform to *Columbia Law Review* citation style. Thus, citations are largely in regular roman font. Additionally, this Note was prepared with minimal edits from Professor Edward Morrison. Professor Morrison provided insight on the substance included in the piece but did not provide structural or stylistic edits.

UP IN THE AIR: RECONCILING THE ILLUSORY RIGHT TO SEVERANCE PAY FOR EMPLOYEES OF BANKRUPT COMPANIES

Bankruptcy law plays a crucial role in the economy, dictating the fate of distressed companies with billions at stake.[1] The rehabilitation of a distressed company affects many players, including lenders, suppliers, customers, and significantly for the purposes of this Note, employees. As expected, the restructuring process often entails significant job losses: Over 60,000 employees lost their jobs in bankruptcies in 2019 alone.[2] One benefit provided to employees to guard against the adverse effects of sudden job loss is severance pay, i.e., some amount of money provided upon termination to cushion an employee's transition to a new job.[3] These benefits can involve significant costs for the organization, with one recent bankruptcy case noting the company owed $12.6 million in severance upon filing for bankruptcy.[4]

The payment of this employee benefit in the context of a bankruptcy proceeding is subject to the rules governing such proceedings, namely the Bankruptcy Reform Act of 1978.[5] Employees are afforded some heightened protections by the Bankruptcy Code, with good reason. Unlike many common creditors in a bankruptcy case, an employee usually relies solely on the debtor

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[1] See e.g., Caroline Hunter, Lehman Emerges from 3.5-year Bankruptcy, Reuters (Mar. 6, 2012) https://www.reuters.com/article/us-lehman/lehman-emerges-from-3-5-year-bankruptcy-idINTRE8250WY20120306 (noting Lehman Brother's $639 billion in assets); Kyle Peterson & Matt Daily, American Airlines Files for Bankruptcy, Reuters (Nov. 29, 2011), https://www.reuters.com/article/us-americanairlines/american-airlines-files-for-bankruptcy-idUSTRE7AS0T220111129 (noting American Airlines reported $24.72 billion in assets and $29.55 billion in liabilities upon filing for bankruptcy); Michael Corkery, Sears, the Original Everything Store, Files for Bankruptcy, N.Y. Times (Oct. 14, 2018) https://www.nytimes.com/2018/10/14/business/sears-bankruptcy-filing-chapter-11.html? ("Sears listed $11.3 billion in liabilities and $7 billion in assets.").

[2] Aisha Al-Muslim, Job Cuts From Bankruptcies Hit Highest Level Since 2005, Wall St. J. (Jan 2, 2020), https://www.wsj.com/articles/job-cuts-from-bankruptcies-hit-highest-level-since-2005-11577988354#:~:text=More%20than%2062%2C100%20job%20losses,2005%2C%20when%2074%2C200%20were%20announced ("More than 62,100 job losses have been announced by U.S.-based employers in the past 12 months due to bankruptcy . . . .").

[3] McClanahan Powers, PLLC, What are Severance Packages? (last updated Mar. 16, 2022), https://mcplegal.com/severance-packages/.

[4] Employee Wages Motion, para. 36, In re S. Foods Grp., LLC, No. 19-36313 (DRJ) (Bankr. S.D. Tex. Feb. 19, 2019) (No. 10).

[5] The Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-15,1326 [hereinafter cited by Bankruptcy Code § only].

company for income and cannot effectively diversify for the risk of default.[6] This concern is exacerbated by the decreasing employee share of power and profit in today's economy.[7] While the Bankruptcy Code does provide protections for employees, these protections are subject to varied application by circuit courts, resulting in widely disparate outcomes depending on where the case is filed. Two of the most common bankruptcy forums, the Southern District of New York (bound by Second Circuit precedent), and the District of Delaware (bound by the Third Circuit), are on opposite sides of this split.[8] Looking to court filings in *In re Payless Holdings LLC* for an illustrative example of this varied treatment, one employee who would have received $10,450 in severance pay in the Southern District of New York was instead allowed only $413—a mere 4% of the benefit.[9]

Furthermore, simply reading the provisions of the Bankruptcy Code does not paint a full picture of the logic of corporate reorganizations.[10] Rather, "much of what matters most in corporate reorganization is still not in print."[11] The flexible common law of bankruptcy, as

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[6] Donald R. Korobkin, Employee Interests in Bankruptcy, 4 Am. Bankr. Inst. L. Rev. 5, 6 (1996). For arguments against this proposition, see Douglas G. Baird, Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren, 54 U. Chi. L. Rev. 815, 817-18 (1987) ("[I]t will not do to advocate giving workers a special priority in bankruptcy but not elsewhere. In a world in which workers enjoy a special priority only in bankruptcy, creditors will strive to resolve their differences outside of bankruptcy.").

[7] Anna Stansbury & Lawrence H. Summers, Declining Worker Power and American Economic Performance, Brookings Papers on Econ. Activity (Mar. 18, 2020), https://www.brookings.edu/bpea-articles/declining-worker-power-and-american-economic-performance/ (concluding a decline in workers' power likely explains the declining share of national income going to labor).

[8] Jared A. Ellias, What Drives Bankruptcy Forum Shopping? Evidence from Market Data, 47 J. Legal Stud. 119, 119 (2018) (referring to the District of Delaware and the Southern District of New York as the "two de facto national bankruptcy courts").

[9] Joint Seventh Omnibus Objections of the Reorganized Debtors and Liquidating Trustee to Certain Employee Claims (Modified), at 12, In re Payless Holdings LLC, No. 19-40883-659 (Bankr. E.D. Mo. May 11, 2019) (No. 1940). While this case was not decided in the District of Delaware, the calculation, set out in detail in the Omnibus Objection, is applying the case law as understood in the District of Delaware. See infra section II.A.1.

[10] Vincent S.J. Buccola, Unwritten Law and the Odd Ones Out, 131 Yale L.J. 1559, 1562 (2022) (reviewing The Unwritten Law of Corporate Reorganizations by Douglas G. Baird (2022)).

[11] Id.; see also Douglas G. Baird, The Unwritten Law of Corporate Reorganizations xiii (2022) (discussing the role bankruptcy judges play in policing negotiations among parties in a bankruptcy proceeding).

developed by bankruptcy judges and nudged forward by the bankruptcy bar,[12] has relied on various provisions of the Bankruptcy Code to provide grounds for discretionary individual remedies—permitting very different results than the overtly rigid confines of the Code's priority scheme.[13] Courts approve employee severance payments under the auspices of such provisions, which would otherwise be strictly limited. This Note will argue that the current convoluted, disparate, and often optional restrictions on severance payments under the Bankruptcy Code reduce the ability of employees to advocate for themselves and for companies to advocate to make employee payments beneficial to rehabilitation.

In Part I, this Note will detail the basic framework of the Bankruptcy Code and explicate the ways in which bankruptcy courts are able to work around these strict limitations to allow payments deemed necessary for successful rehabilitation of the debtor. Part II will situate employee severance payments within this framework, explaining majority and minority circuit court analyses of allowed severance pay in bankruptcy, as well as the evolving process through which bankruptcy courts approve compensation plans outside of these limits. Finally, Part III will propose a solution which separates out and simplifies the treatment of severance pay in bankruptcy, codifying the discretion currently employed by bankruptcy courts while increasing the minimum protections for these payments.

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[12] See generally, Nancy B. Rapoport, Rethinking Professional Fees in Chapter 11 Cases, 5 J. Bus. & Tech. L. 263 (noting "lawyers and financial advisors, among others" representing "the debtor and various creditors' committees in bankruptcy cases").

[13] Adam J. Levitin, Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime, 80 Am. Bankr. L.J. 1, 2 (2006).

I. THE BANKRUPTCY PRIORITY FRAMEWORK AND ITS MANY EXCEPTIONS

Employee severance in bankruptcy is of course governed by the application of the general bankruptcy framework set out by Congress through the Bankruptcy Code. Section I.A focuses on bankruptcy's basic function of facilitating equal distribution of the estate to similarly situated claimants while preserving state law entitlements. Section I.B explains deviations from this baseline structure through priorities created by the Bankruptcy Code and explicates justifications offered for these exceptions. Finally, section I.C explains court-permitted deviations from the Code's established priority scheme.

A. *The Priority Framework*

The Bankruptcy Code steps in when a firm has insufficient assets to repay all its creditors, enforcing priority rules to determine the order of payment.[14] Filing for bankruptcy halts all debt collection activity by imposing an automatic stay on actions to recover assets of the debtor.[15] Creditors can no longer go after assets of the bankrupt company on their own.[16] Instead, they must follow the Bankruptcy Code's particular order of priority for creditors to collect on their claims[17] against the estate.[18] This prevents a value destructive "race to the courthouse," where

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[14] See Bankruptcy Code § 1129(b) (2018) (mandating that without the consent of senior creditors, junior creditors cannot receive any recoveries unless and until senior creditors are paid in full); Mark J. Roe & Frederick Tung, Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors Bargain, 99 Va. L. Rev. 1235, 1236 (2013). This Note, because it focuses principally on employee treatment in corporate reorganizations, will be limited to an examination of business debtors, regardless of the availability of Chapter 7 and Chapter 11 reorganization processes to individual consumers.

[15] Bankruptcy Code § 362(a) (imposing the automatic stay). The automatic stay is effective as soon as the bankruptcy petition is filed. Id.

[16] Id.; see also City of Chicago, Illinois v. Fulton, 141 S. Ct. 585 (2021) ("When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum.").

[17] Section 101(5) defines a "claim" as any "right to payment," broadly encompassing debtor obligation's "whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Bankruptcy Code § 101(5).

[18] The assembled assets of the debtor form the bankruptcy "estate," comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." Bankruptcy Code § 541(a)(1). The bankruptcy estate represents "the assets [that] are available for distribution to creditors." Barry E. Adler, Anthony J. Casey & Edward

creditors attempt to grab what is left of the debtors' assets before someone else does.[19] The Code then provides strict rules about what claims are paid when—rules which govern the payment of employee severance amounts.

The distribution process marks an essential division between secured and unsecured creditors. Secured creditors enjoy extensive protections of their state-created property rights in assets of the debtor, or security interests, while unsecured creditors are left to share equally in the remaining pool of estate assets.[20] Assets serving as collateral for the claims of secured creditors, typically banks and other lenders who negotiated for a security interest to protect their loans, will be set aside to cover the related secured claim.[21] All other claimants are unsecured creditors. This group includes all manner of vendors who worked with the debtor prior to bankruptcy—suppliers, contractors, utility companies, and even government entities like the IRS. Centrally for this Note, employees are often left with many unsecured claims against the debtor: unpaid

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R. Morrison Casebook, Baird and Jackson's Bankruptcy: Cases, Problems, and Materials 257 (5th ed. 2020) [hereinafter, Adler, Casey & Morrison Casebook].

[19] See In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988) (noting the aim of the bankruptcy code to "discourage creditors from racing to the courthouse to dismember the debtor during its slide into bankruptcy and to further the prime bankruptcy policy of equal distribution among similarly situated creditors").

[20] Adler, Casey & Morrison Casebook, supra note 18, at 238 (secured claims "are granted special protection under . . . the Code" while "unsecured claims . . . are treated as ordinary general obligations"). This is a foundational principle of bankruptcy law, with the "absolute priority rule" dictating that "when distributing value in bankruptcy, claimants' priorities outside of bankruptcy are honored inside bankruptcy." Roe & Tung, supra note 14, at 1236; see also Bruce A. Markell, Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations, 44 Stan. L. Rev. 69, 123 (1991) ("For over fifty years, the absolute priority rule has been the cornerstone of reorganization practice and theory.").

[21] A secured creditor in a Chapter 7 liquidation must receive the value of their collateral prior to distributions to other creditors. See Bankruptcy Code § 725 (2018) ("[B]efore final distribution of property of the estate . . . the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien."). This protection is imported to Chapter 11, which provides that unless the creditor consents, the creditor must "receive or retain . . . value . . . that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title." Bankruptcy Code § 1129(a)(7) (2018). Secured creditors receive full repayment of their loan up to the value of their security interest, with the remainder of the claim relegated to unsecured status. In re 680 Fifth Ave. Associates, 156 B.R. 726, 731 (Bankr. S.D.N.Y 1993) ("An unsecured creditor has both a secured claim equal to the value of the collateral and an unsecured deficiency claim for the remainder." (citing Bankruptcy Code § 506(a)))

wages, retirement contributions, health care benefits, and in the likely event an employee is fired in the course of the restructuring, severance pay.

As mentioned, unsecured creditors share in the remainder of the estate not claimed as collateral by secured creditors,[22] with assets distributed pro rata among this group.[23] As an example, if the estate has $50 million in available assets, and unsecured claims against the estate total $100 million, each claim will be paid at fifty percent, or fifty "cents on the dollar" in bankruptcy jargon.[24] In modern business reorganizations, much of the estate is subject to secured loans,[25] leaving small recoveries for unsecured creditors. As illustrative examples of unsecured creditor recoveries in the reorganization of large businesses, unsecured creditors were expected to receive recoveries on their claims of 1.6%-4.1% in the Brooks Brothers bankruptcy,[26] 1%-2% in the Cloud Peak Energy bankruptcy,[27] 2.04% in the Sears bankruptcy,[28] and 0% in the Ultra

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[22] Chapter 11 – 101, Am. Bankr. Inst. (July 1, 2004), https://www.abi.org/abi-journal/chapter-11-101 (noting that while the rule of "pro rata" distribution is not "spelled out in any detail" the rule is "so basic that nobody thought to say so," and "Code provisions . . . recognize these basic rules . . . in a backhanded way").

[23] See In re Saybrook Mng. Co., 963 F.2d 1490, 1491 (11th Cir. 1992) (noting an unsecured claim should have "shared in a pro rata distribution of the debtors' unencumbered assets along with the other unsecured creditors"). The Code enacts pro rata distributions through section 1129(b), which commands that creditors with similar legal entitlements are grouped into "classes." Bankruptcy Code § 1122(a). Classes are paid in order of their priority, and the first class of creditor for whom there is not sufficient funds to pay in full will share proportionally in the remaining value. Id. §§ 507(a), 1129(a).

[24] Jay Lawrence Westbrook, A Functional Analysis of Executory Contracts, 74 Minn. L. Rev. 227, 252-53 (1989) (noting "unsecured creditors share proportionately in distributions" and thus are while "[t]heir claims are calculated in full under state law" their actual relief "can be thought of as being in little tiny Bankruptcy Dollars, which may be worth only ten cents in U.S. dollars").

[25] See Barry E. Adler, Vedran Capkum, Lawrence A. Weiss, Value Destruction in the New Era of Chapter 11, 29 J.L. Econ. & Org. 461, 462 (2012).

[26] Disclosure Statement for Amended Joint Chapter 11 Plan of Liquidation for BBGI US, Inc. and Its Affiliated Debtors, at 5, In re BBGI US Inc., No. 20–11785 (CSS) (Bankr. D. Del. Jan. 22, 2021) (No. 919).

[27] Disclosure Statement for the Joint Chapter 11 Plan of Cloud Peak Energy Inc. and Certain of Its Debtor Affiliates, at 5, In re Cloud Peak Energy Inc., No. 19-11047 (KG) (Bankr. D. Del. Oct. 22, 2019) (No. 745).

[28] Disclosure Statement for Modified Second Amended Joint Chapter 11 Plan of Sear Holdings Corporation and Its Affiliated Debtors, at 70, In re Sears Holding Corp., No. 18-23538 (RDD) (Bankr. S.D.N.Y. July 9, 2019) (No. 4478).

Petroleum bankruptcy.[29] An employee's unsecured claim for severance is often going to yield next to nothing in the bankruptcy process.

B. *Codified Alterations to the Basic Priority Framework*

The "theme of the Bankruptcy Act," according to the Supreme Court, is "equality of distribution."[30] The bankruptcy process sets aside encumbered assets—those claimed by secured creditors—and distributes the rest of the estate equally among unsecured creditors. But the Bankruptcy Code does create certain exemptions, privileging certain unsecured creditors for payment ahead of others.[31] The rationale behind some of these deviations is to facilitate the rehabilitation of the debtor,[32] while others reflect policy choices by Congress to protect certain creditor groups.[33] Employees benefit from these exceptions, due in part to their central role in the successful rehabilitation of a business,[34] but also as a product of a congressional policy determination that employees should be protected in bankruptcy.[35]

1. *Administrative Priority Status: The Cost of Running the Business*

During the bankruptcy case, the debtor must continue to operate to have a chance of emerging from bankruptcy as a viable business,[36] and as a corollary, to maximize value for

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[29] Disclosure Statement for Debtors' Joint Chapter 11 Plan of Reorganization of Ultra Petroleum and Its Debtor Affiliates, at 15, In re Ultra Petroleum Corp., No. 20-32631 (Bankr. S.D. Tex. 2020) (No. 18).

[30] Nathanson v. N.L.R.B., 344 U.S. 25, 29 (1952) (quoting Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941)); see also, e.g., Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co, 547 U.S. 651, 653 (2006); Kothe v. R.C. Taylor Trust, 280 U.S. 244, 277 (1930).

[31] See Bankruptcy Code §§ 507(a), 503(b) (2018).

[32] See infra sections II.B.1-2.

[33] See, e.g., H.R. Rep. No. 109-31(I), at 16-17 (2005) (detailing amendments to further increase protections for those domestic support claims in personal bankruptcies); Bankruptcy Code § 507(a)(6)(A) (providing priority status for unsecured claims of grain framers); Id. § 507(a)(8) (providing priority statues to governmental units owed certain taxes).

[34] See H.R. Rep. No 95-595, at 187 (1977) (noting that granting priority for employee claims "is in part to ensure that employees will not abandon a failing business" and thus "contributes to financial rehabilitation").

[35] H.R. Rep. No. 109-31(I), at 154 (noting that an amendment to section 507(a) serves to "provide heightened protections for employees by increasing the monetary cap on wage and employee benefit claims").

[36] Chapter 11 of the Bankruptcy Code governs business reorganizations, intended for companies where "assets that are used for production in the industry for which they were designed are more valuable than those same assets

creditors. Running the business, however, requires the postpetition debtor, often referred to as the "debtor-in-possession," to incur further costs—transacting with vendors, landlords, utility companies, and employees to continue operating. These parties will need some assurance of payment before providing goods and services to a company which has just formally declared it cannot pay its debts.[37] Administrative claim status under section 503(b)[38] provides a solution to this problem, allowing, after notice and hearing, payment of "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case."[39] Administrative claims are first in line for payment from the debtor's unencumbered assets,[40] and must be paid in full for the debtor to emerge from bankruptcy.[41]

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sold for scrap." See H.R. Rep. 95-595, at 220 (1798). The Chapter 11 process is distinguished from the simple liquidation process in a Chapter 7 bankruptcy, which is better suited for situations where the liquidation value of the business—essentially the company's value when sold for parts—is greater than the value of the company as a going concern entity. Adler, Casey & Morrison Casebook, supra note **Error! Bookmark not defined.**, at 31 ("Chapter 7 c oncerns individual and corporate debtors whose assets are to be liquidated.").

[37] H.R. Rep. 95-595 at 186-87 (1978) ("Those who must wind up the affairs of a debtor's estate must be assured of payment, or else they will not participate in the liquidation or distribution of the estate."); see also In re Mammoth Mart, 536 F.2d 950, 954 (1st Cir. 1976) (recognizing that "if a business is to be reorganized, third parties must be willing to provide the necessary goods and services," and that such parties "clearly will not do so unless their claims for payment will be paid ahead of the pre-petition debts and liabilities of the debtor").

[38] It should be noted that many of the seminal cases governing the interpretation of provisions of the Bankruptcy Code generally, as well as the administrative expense provision specifically, were decided under prior version of the statute: The Bankruptcy Act of 1898. § 64(a), ch. 541, 30 Stat. 544, 563 (superseded by 11 U.S. Code § 503(b)(1)(A) (1976)). However, the language of the prior administrative expense provision is substantially similar, and courts interpreting section 503(b) under the current Bankruptcy Code have freely applied prior interpretations of the superseded section 64(a). See e.g., In re Jartran, Inc., 732 F.2d 584, 587.

[39] Bankruptcy Code § 503(b) (2018); see also Reading Co. v. Brown, 391 U.S. 471, 475 (1968) (explaining the purpose of the administrative expense priority is to facilitate the operation of the debtor-in-possession's business).

[40] Bankruptcy Code § 507(a)(2). While section 507(a)(1) provides first priority to domestic support obligations, this provision is not applicable to business reorganizations, rendering administrative expenses under § 507(a)(2) effectively first priority.

[41] Bankruptcy Code § 1129(a)(9)(A) (requiring either the full payment of administrative expenses upon the debtor's exit from bankruptcy, or the consent of the administrative claimant to lesser treatment).

While allowing full payment of these postpetition administrative claims helps facilitate a successful reorganization,[42] these payments deplete assets otherwise available to unsecured creditors. Thus, what constitutes an administrative claim is narrowly construed.[43] Courts limit these expenses by requiring that (1) the expense arises from a postpetition transaction and (2) is beneficial to the operation of the estate.[44] This test, set forth in *In re Mammoth Mart*, has been widely adopted to analyze when a claim is an allowed administrative expenses.[45] The court made clear that "[i]t is only when the debtor-in-possession's actions themselves—this is, considered apart from any [prepetition] obligation of the debtor—give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of the administration."[46]

The timing of when consideration was provided for a creditor's right to payment therefore can be determinative of claim status. If a benefit is provided postpetition, the claim will be deemed an allowed administrative expense claim, and typically paid in full. If the benefit is provided prepetition, the claim will be relegated to sharing equally in the pool of assets available to all creditors, often recovering only small portion of the amount due.[47] Under this seemingly simple rule, determining administrative status is often simple. For example, wages are

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[42] *Mammoth Mart*, 536 F.2d at 954; In re Health Maint. Found., 680 F.2d 619, 621 (9th Cir. 1982) ("Guaranteeing priority payment to creditors of the trustee encourages such creditors to do business with a company undergoing a Chapter XI reorganization.").

[43] See In re Energy Future Holdings Corp., 990 F.3d 728 (3d Cir. 2021) ("Section 503(b)(1)(A) 'limits recovery to those claims that are actual and necessary [to] prevent[] the estate from being consumed by administrative expenses[] and preserve[] the estate for the benefit of creditors.'" (quoting In re Marcal Paper Mills, Inc., 650 F.3d 311, 315 (3d Cir. 2011)).

[44] See *Mammoth Mart*, 536 F.2d at 954-55. The Supreme Court noted that the terms "actual" and "necessary" were not defined in the administrative expense section, and therefore they must "look to the general purposes of [the section], Chapter XI, and the Bankruptcy Act as a whole." Reading Co. v. Brown, 391 U.S. 471, 476 (1968).

[45] The First Circuit's *Mammoth Mart* test has been adopted widely across circuit courts. See e.g., In re O'Brien Env't Energy, Inc., 181 F.3d 527, 532-33 (3d Cir. 1999); Abercrombie v. Hayden Corp. (In re Abercrombie), 139 F.3d 755 (9th Cir.1998); Isaac v. Temex Energy, Inc. (In re Amarex, Inc.), 853 F.2d 1526 (10th Cir. 1988); In re White Motor Corp., 831 F.2d 106, 110 (6th Cir. 1987); Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98 (2d Cir. 1986); In re Jartran, Inc., 732 F.2d 584, 587 (7th Cir. 1984).

[46] *Mammoth Mart*, 536 F.2d at 955.

[47] See supra notes 26-30.

"ordinarily tied to the clear moment when services are rendered," thus wages for postpetition services are administrative expenses, while wages for prepetition services are not.[48] Yet there are many claims which are less easily categorized.[49] Just because the obligation comes due after the bankruptcy filing date is not determinative of administrative status: The "determinative factor is not when the right to payment matured, but rather, when it was earned."[50] This distinction requires understanding when the debtor's liability on the claim arose, i.e., when consideration was provided, rather than when the payment is triggered or comes due.

As an example, an insurance policy with an annual premium due after the debtor files for bankruptcy will not be considered an administrative claim in its entirety. If the premium comes due one month after filing, only the portion of the premium attributable to that one month ($1/12^{th}$ of the annual premium) is granted administrative status and paid in full on confirmation. The remaining portion will be categorized as an unsecured claim, sharing equally in unencumbered assets available after priority distributions.[51]

Employee benefits claims which "are partially 'earned' before the filing of the petition, but become payable upon the happening of some postpetition event" have proven difficult to fit into

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[48] Korobkin, supra note 6, at 14.

[49] In re DAK Indus., Inc., 66 F.3d 1091, 1095 (9th Cir. 1995) (looking "through . . . form to the economic realities of th[e] particular arrangement," to determine administrative expense priority status of a transaction). The Bankruptcy Code in section 101(5) defines a "claim" as any "right to payment," broadly encompassing debtor obligation's "whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Bankruptcy Code § 101(5).

[50] In re Uly-Pak, Inc., 128 B.R. 763, 766 (Bankr. S.D. Ill. 1991) (citations omitted); see also Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc. 789 F.2d 98, 101 (2d Cir. 1986) ("A debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate." (citations omitted)). *Amalgamated Ins. Fund* goes on to note that administrative expense status "depends upon the consideration supporting" the right of payment. Id.

[51] See In re Gamma Fishing Co., Inc., 70 B.R. 949, 955 (Bankr. S.D. Ca. 1987) ("A debtor receiving necessary benefits from a pre petition executory insurance contract must accord the non-debtor party an administrative expense priority for the pro rata share of the premium, during the period in which the estate received benefits from the contract.").

this framework.[52] Severance payments are prime example of this confusion: If the debtor terminates employees after filing, the obligation to make severance payments owed to these employees does come due after filing—but courts have disagreed for over sixty years on when exactly these benefits were earned.[53]

2. *Statutory Priority: Congressional Policy Preferences*

The Bankruptcy Code also grants priority status under section 507(a) to certain enumerated categories—priorities which can be understood as policy decision by Congress that certain claims should be paid prior to the general pool of unsecured claims.[54] This provision privileges amounts owing to tax authorities, money due as child support payments, and money owed to employees of the debtor.[55]

For employees, section 507(a)(4) of the Code allows priority status for "wages, salaries, or commissions, including vacation severance, and sick leave pay earned by an individual" "within 180 days before the date of the filing of the petition."[56] As with administrative expenses, eligibility of prepetition employee claim for priority status hinges on timing: The claim must be "earned" "within 180 days before the date of the filing of the petition."[57] Additionally, an

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[52] Korobkin, supra note 6, at 14.

[53] See infra section II.A.1 for further discussion.

[54] See Elizabeth Warren & Jay Lawrence Westbrook, Contracting Out of Bankruptcy: An Empirical Intervention, 118 Harv. L. Rev. 1197, 1203 (noting "the protection of employees" as a "deliberate policy objective" of bankruptcy laws).

[55] Bankruptcy Code §§ 507(a) (2018).

[56] Bankruptcy Code § 507(a)(4). Prior to 2005, employee priority status was codified in section 507(a)(3) of the Bankruptcy Code. Pub. L. No. 103-394, § 108(c) (1994). In 2005, however, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act, and moved domestic support obligations from seventh priority to first priority, resulting in the employee wages provision shifting from 507(a)(3) to 507(a)(4). See Pub. L. No. 109-8, § 802(d)(7). This amendment also increased the prefiling period eligible for priority from 90 to 180 days. See Matson v. Alarcon (In re LandAmerica Fin. Grp., Inc.), 435 B.R. 343, 349 n.8 (Bankr. E.D. Va. 2010) ("When the Bankruptcy Code was amended in 2005, § 507(a)(3) became § 507(a)(4) and the period for calculating the priority was expanded from 90 days to 180 days."). However, courts continue interpret the slightly updated version of the statute with the same case law. E.g., id. at 338-39.

[57] Bankruptcy Code § 507(a)(4) (2018).

individual employee's total wage priority claims are capped at $15,150, with remaining unpaid amounts relegated to unsecured status.[58]

Scholars have attempted to explicate the justifications for preferring certain unsecured creditors over others,[59] explaining employee preferences in the Code by emphasizing that employee creditors are "particularly ill-suited for the task of assessing and spreading risk in order to shield themselves from the effects of their employer's misfortunes."[60] Unlike commercial creditors, with many economic relationships, most employees have just one employer, constraining their ability to mitigate the harm of employer default.[61] Additionally, as opposed to sophisticated commercial vendors, employees have not meaningfully assumed the risk of their employer's default. Employees are often restricted to jobs in specific geographic locations and industries, and therefore have a limited ability to select against companies with a risk of financial distress.[62] Furthermore, scholars have argued that while in theory employees can account for a company's financial health in selecting an employer, given the small size of employee claims and the expertise required to make these assessments, it would be irrational for them to do so.[63] Taken together, these concerns provide strong justifications for the Code's provision of modest protections to employee creditors over other categories of creditors.[64]

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[58] Bankruptcy Code § 104 (providing for regular increases to certain dollar amounts in the bankruptcy code); Adjustment of Certain Dollar Amounts in the Bankruptcy Code, 87 Fed. Reg. 6625 (Jan. 31., 2022) (raising the dollar amount under § 507(a) to $15,150).

[59] See Warren & Westbrook, supra note 54, at 1203 (providing efficiency justifications for protecting "maladjusting creditors" in bankruptcy law).

[60] Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World, 92 Mich. L. Rev. 336, 357 (1993).

[61] See id.

[62] Lucian Arye Bebchuk & Jesse M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, 105 Yale L.J. 857 (1996) ([E]ven if a creditor with a small claim could costlessly acquire information about a firm's secured debt, the creditor would still be required to estimate the firm's likelihood of insolvency, its insolvency value, and the extent of its unsecured debt, in order to estimate its own risk of loss."); see also Korobkin, supra note 6, at 6.

[63] Bebchuk & Fried, supra note 62, at 857.

[64] But see Daniel Keating, The Fruits of Labor: Worker Priorities in Bankruptcy, 35 Az. L. Rev. 905, 926 (1993) (arguing that worker priorities which exist only in bankruptcy create perverse incentives for employees).

C. *Judicial Discretion to Reorder Priority Structure*

Understanding the statutory priority structure as set out by the Bankruptcy Code does not provide the full picture of payments permitted during a bankruptcy. Outside of the statutory priority for certain wages and administrative claims, bankruptcy judges often approve payments on account of prepetition claims when deemed necessary the rehabilitation of the business—a practice which stems from the "doctrine of necessity." The words "doctrine of necessity" cannot be found in the Bankruptcy Code,[65] but the term is well-recognized in bankruptcy scholarship[66] and in bankruptcy practice[67]—littering the pages of the many motions filed in many large Chapter 11 cases.[68] The judge-made doctrine originated with railroad bankruptcies in the 1800s,[69] putting forth the basic premise that "[s]ometimes immediate payment to a prepetition

[65] Russell A. Eisenberg & Frances F. Gecker, The Doctrine of Necessity and Its Parameters, 73 Marq. L. Rev. 1, 5 (1989) ("No Code provision . . . explicitly authorizes the use of the Doctrine."); see also In re CEI Roofing, Inc., 315 B.R. 50, 53 (Bankr. N.D. Tex. 2004) ("Most courts looking at the issue [of first day relief] have struggled to find a statutory basis for the payment of prepetition claims during the pendency of the case.").

[66] See, e.g., Alan N. Resnick, The Future of the Doctrine of Necessity and Critical-Vendor Payments in Chapter 11 Cases, 47 B.C. L. Rev. 183, 184 (2005); Eisenberg & Gecker, supra note 65, at 1 ("Skilled bankruptcy lawyers and judges often invoke this ill-defined Doctrine at the beginning of a reorganization case to authorize the postpetition payment of prepetition employee wages, benefits, and services . . . ."); Ashley M. McDow & Michael T. Delaney, Critical Vendors—Necessity or Nullity, 33 Cal. Bankr. J. 25, 25 (2014) ("One important aspect of this debate concerns the payment of prepetition claims under the 'doctrine of necessity' . . . .").

[67] See, e.g., In re Windstream Holdings Inc., 614 B.R. 441, 460 (S.D.N.Y. 2020) (finding "the Bankruptcy Court appropriately applied the doctrine of necessity in this case"); In re CoServ, L.L.C., 273 B.R. 487, 491 (Bankr. N.D. Tex. 2002) ("Debtors assert that, on the basis of the "Doctrine of Necessity" . . . this Court has ample equitable powers to authorize the pre-plan payment of selected prepetition claims."); *CEI Roofing*, 315 B.R. at 54 (discussing the application of the doctrine of necessity to allow the payment of prepetition claims).

[68] See, e.g., Employee Wages Motion, paras. 53-55, In re Purdue Pharma L.P., No. 19-23649-RDD (Bankr. S.D.N.Y. Sept. 16, 2019) (No. 6) (asserting "that payment of the Pre-petition Employee Obligations" is justified under the "'necessity of payment' doctrine"); Employee Wages Motion, paras. 60-62, In re FTX Trading Ltd., No 22-11068-JTD (Bankr. D. Del. Nov. 19, 2022) (No. 50) ("Courts in this district have recognized the 'necessity of payment' doctrine"); Employee Wages Motion, paras. 102-103, In re Hertz Corp., No 20-11218-MFW (Bankr. D. Del. May 24, 2020) (No. 20) (noting the "well established 'necessity of payment doctrine'").

[69] The Supreme Court first articulated the doctrine of necessity in connection with railroad reorganization cases to "give[] courts discretion to deviate from the otherwise applicable rules of priority by making early payments to certain creditors to achieve the greater goal of a successful reorganization." Resnick, supra note 66, at 187-88; see also Miltenberger v. Logansport Railway Co., 106 U.S. 286, 310-12 (1882). However, the doctrine came to justify payment of prepetition claims outside of specifically railroad reorganizations. Dudley v. Mealey, 147 F.2d 268, 271 (2d Cir. 1945) (finding the doctrine should be applied in more broadly when its "essential to the preservation of the business").

creditor will make the creditors as a group better off,"[70] as a justification for paying prepetition claims otherwise relegated to unsecured status. Without statutory support in the current iteration of the Bankruptcy Code, courts have taken to citing § 105(a) as a basis for this power.[71] Section 105(a) permits a bankruptcy court to "issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of" the Code.[72]

There is some dispute among the courts regarding the legitimacy of the doctrine, with the Seventh Circuit's decision in *In re Kmart* stating that the "'doctrine of necessity' is just a fancy name for a power to depart from the code"[73] and finding that § 105(a) "does not allow a bankruptcy judge to authorize full payment of . . . unsecured debt."[74] Still, *Kmart* entertained the possibility that another provision of the Code, § 363(b), in conjunction with § 105(a), could permit the payment of prepetition claims.[75]

While no appellate holdings after *Kmart* have favored these prepetition payments,[76] many bankruptcy courts have continued the practice of allowing payment of prepetition claims during

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[70] Eisenberg & Gecker, supra note 67, at 3.

[71] See e.g., In re Just for Feet, Inc., 242 B.R. 821, 824 (Bankr. D. Del. 1999) ("While [the necessity payment doctrine] was not codified in the Bankruptcy Code, courts have used their equitable power under section 105(a) of the Code to authorize the payment of pre-petition claims when such payment is necessary to the survival of a debtor in a Chapter 11 reorganization."); see also In re Chateaugay Corp., 80 B.R. 279, 281, (S.D.N.Y. 1987) (relying more broadly on a bankruptcy court's equitable powers to justify the payment of prepetition claims)

[72] Bankruptcy Code § 105(a) (2018).

[73] In re Kmart, 359 F.3d 866, 871 (7th Cir. 2004).

[74] Id. See also Official Committee of Equity Security Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987) (finding "equitable powers under § 105(a)" "are not a license for a court to disregard the clear language and meaning of the bankruptcy statues and rules"); Matter of Oxford Management, Inc., 4 F.3d 1329, 1334 (5th Cir. 1993) (finding that the "powers granted by [section 105(a)] must be exercised in a manner that is consistent with the Bankruptcy Code"). Cf., *Just for Feet*, 242 B.R. at 824 ("While [the necessity payment doctrine] was not codified in the Bankruptcy Code, courts have used their equitable power under section 105(a) of the Code to authorize the payment of pre-petition claims when such payment is necessary to the survival of a debtor in a Chapter 11 reorganization."); *Chateaugay Corp.*, 80 B.R. at 281 (relying on a bankruptcy court's equitable power to allow prepetition payments).

[75] *Kmart*, 359 F.3d at 871--72.

[76] David Weiner, After Kmart: The Standard for Authorizing "Critical Vendor" Payments, 2013 Norton Ann. Surv. of Bank. L. 9.

the bankruptcy proceeding by linking § 105(a) to § 363(b)—as suggested in dicta by the *Kmart* court—to provide a statutory basis for the power.[77]

Section 363(b) of the Bankruptcy Code permits a debtor to use estate property "other than in the ordinary course of business" after a notice and hearing.[78] Courts premise the approval of such transactions on proof of a "sound business purpose" to justify the requested action.[79] Debtors often advocate for the payment of employee compensation programs under the strong argument that employee retention and morale is essential to the continued operation of the business. While commentators have expressed concerns that "using section 363(b) as a basis to allow prepetition payments . . . potential[ly] conflict[s]with the priority scheme established by the code,"[80] the practice of paying prepetition claims when deemed vital to the restructuring of the business continues, with the blessing of many bankruptcy courts.[81]

1. *Discretion in Venue Choice for Prospective Debtors*

Under the Bankruptcy Code, the prospective debtor is able to select the venue for its chapter 11 case.[82] A company can file for bankruptcy in any district where its "domicile, residence, principal place of business . . . or principal assets" are located, or any district where there is a

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[77] See, e.g., Debtors' Motion for Order Pursuant to Sections 105(a), 363(b) and 503(b)(1) of the Bankruptcy Code Authorizing the Continuation and Implementation of: (A) Employee Severance Policy; and (B) Key Employee Retention Policy, at 1, In re Mariner Post-Acute Network, Inc., No. 00-00113 (MFW) (Bankr. D. Del. Nov. 16, 2000) (arguing section 363(b) justifies the Debtors' proposed employee payments and section 105(a) allows the court to approve any prepetition related amount); see also Weiner, supra note 76.

[78] Bankruptcy Code § 363(b)(1).

[79] See In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983).

[80] Weiner, supra note 76.

[81] See Roe & Tung, supra note 14, at 1238 (describing common "priority jumps" achieved by "persuading bankruptcy courts" to allow preferential treatment of certain claims). One possible check on this discretion is the U.S. Trustee program, a division of the Department of Justice authorized to generally "oversee compliance with the U.S. Bankruptcy Code and to ensure that business restructurings do not fall victim to abuse." Lindsey D. Simon, The Guardian Trustee in Bankruptcy Courts and Beyond, 98 N.C. L. Rev. 1299, 1299-1300 (2020). See generally, U.S. Trustee Program, DOJ, About the Program, https://www.justice.gov/ust/about-program (last visited Jan. 14, 2023).

[82] See In re Enron Corp., 274 B.R. 327, 341 (Bankr. S.D.N.Y. 2002) ("[A] prospective debtor may select the venue for its Chapter 11 reorganization.").

case pending concerning an "affiliate" of the debtor, i.e., another entity in the corporate group.[83] In 2009, General Motors took advantage of these broad provisions, using the bankruptcy filing of a subsidiary Harlem dealership to file the corporation as a whole in the Southern District of New York—regardless of the fact that the company's headquarters and domicile were located elsewhere.[84] Venue choice has resulted in the consolidation of most large bankruptcy filings in just a few forums across the country, historically the District of Delaware and the Southern District of New York,[85] with the Southern District of Texas and the Eastern District of Virginia more recently gaining ground.[86] Some tout the efficiency of consolidating complex cases in courts known for their expertise in handling such cases,[87] but others point to "forum shopping" as the root of many problems in the bankruptcy system.[88] While this Note will not enter into the debate, it is still important to consider that company has the ability to weigh the effects of circuit splits on issues of particular importance to the company,[89] and choose where to file the case.

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[83] Bankruptcy Code § 1408 (2018).

[84] Tom Hals & Martha Graybow, GM Bankruptcy Forever Linked to Harlem Dealership, Reuters (June 1, 2009), https://www.reuters.com/article/us-gm-harlemdealership/gm-bankruptcy-forever-linked-to-harlem-dealership-idUSTRE55050V20090601.

[85] Jared A. Ellias, What Drives Bankruptcy Forum Shopping? Evidence from Market Data, 47 J. Legal Stud. 119, 119 (2018) ("When large firms file for bankruptcy, they tend to do so in the US Bankruptcy Courts of the District of Delaware and the Southern District of New York.").

[86] Michael Corkery & Jessica Silver-Greenberg, Why Companies Like Toys 'R' Us Love to Go Bust in Richmond, Va., N.Y. Times (Nov. 14, 2017), https://www.nytimes.com/2017/11/14/business/economy/richmond-bankrupty-court.html (noting that "Richmond is gaining ground" as a location for bankruptcy filings); Sujeet Indap, Houston Becomes a Magnet for Blockbuster US Bankruptcies, Fin. Times (Jan. 12, 2022), https://www.ft.com/content/41c8bfa9-a60b-43a2-917d-323b3ee5e19d ("Houston has emerged as a favoured destination for companies seeking Chapter 11 protection.").

[87] Kenneth Ayotte & David A. Skeel, Jr., An Efficiency-Based Explanation for Current Corporate Reorganization Practice, 73 U. Chi. L. Rev. 425, 462 (replying to criticism of forum shopping by arguing concentration in particular forums increases the efficiency of the bankruptcy system).

[88] See Lynn M. Lopucki, Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts 5 (2006) (arguing that permissive venue provisions leads courts to compete for prestigious cases).

[89] Marcia L. Goldstein, Scott E. Cohen & Robert J. Welhoelter, Weil, Gotshal & Manges LLP, Venue Considerations: Differences Among the Circuits on Common Recurring Issues in Chapter 11 Cases 2-3 (2004), https://www.sbli-inc.org/archive/2004/documents/17000000.pdf (noting that a jurisdiction's case law "with respect to legal issues that are important to the debtor" should be an important factor in venue choice). The piece provides a chart "illustrative of a 'Venue Analysis,'" an activity undertaken to determine which forum is most favorable on issues important to the debtor before selecting where to file. Id. See also Andy Dietderich, "Confessions" of a

II. APPLYING THE PRIORITY FRAMEWORK TO SEVERANCE PAYMENTS: DISJOINTED, INEQUITABLE, AND OFTEN OPTIONAL

The priority framework discussed in Part I does not easily map on to employee severance claims. Courts have reached different answers in analyzing the allowed amount of priority severance pay in bankruptcy, with normative problems under both the majority approach and the minority approach. The resulting limits on payment often result in outcomes out of step with the articulated goals of bankruptcy: "preserving going concerns and maximizing property available to satisfy creditors."[90] Furthermore, the majority's restrictive interpretation of the allowed priority portion of employee severance payments is in stark contrast with judicial orders allowing employee payments at the debtor's request.[91]

A. *Applying the Bankruptcy Code's Priority Framework to Severance Pay*

One of the more important analytical distinctions when determining the priority status of severance pay under the Bankruptcy Code is if the severance is owed under (1) a generally applicable company policy awarding severance based on an employee's length of service, or (2) a lump sum due under an employment agreement for termination without cause.[92] Severance

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Forum-Shopper: Part 1, 40 Am. Bankr. Inst. J. 28, 29 (2021), https://www.sullcrom.com/files/upload/ABI-confessions-of-forum-shopper-dietderich.pdf.

[90] Bank of Am. Nat. Trust and Sav. Ass'n v. 204 N. LaSalle St. P'ship, 526 U.S. 434, 435 (1999).

[91] See supra section II.B.3; see also infra section II.C.

[92] Traditionally, under *In re Public Ledger*, courts often cite the two types of severance pay as "payment in lieu of notice" and "payment based on length of termination." See e.g., In re Health Maint. Found., 680 F.2d 619, 621 (9th Cir. 1982) (citing In re Public Ledger, 161 F.2d 762, 771 (3d Cir. 1947). More prevalent in case law today, and representing the more salient distinction, is between set amounts due upon "termination without cause" and severance "based on length of service." See Christopher A. Jarvinen, Administrative Expense Priority for Claims Arising Under Prepetition "Golden Parachute" Agreements, Norton Ann. Surv. Bankr. L. 10, 14 (2003) (noting severance "in lieu of termination" but focusing primarily on the separate analysis of severance due "termination without cause" provisions); In re M Grp., Inc., 268 B.R. 896, 900 (Bankr. D. Del. 2001) (noting that "termination without cause" types of severance provisions "do[] not appear to fall within categories recognized in *Public Ledger* and its progeny"). Severance "in lieu of notice" is uniformly understood as entirely categorized as an administrative expense, and is thus less often litigated. See *Health Maint. Found.*, 680 F.2d at 621 ("The presumption is that the trustee chose to terminate the employee without notice as a part of administering the Chapter XI reorganization, and the severance pay in lieu of notice is therefore considered a cost of administration.").

based on an employee's length of service is a benefit keyed to the length of the employee's tenure with the company, e.g., one week of pay for each year of employment.[93] Thus, an employee who worked for the company for eight years would receive eight weeks of their salary after termination as severance.[94] These policies are typically not considered executory contracts, which are governed by special provisions of the Bankruptcy Code.[95] Alternatively, a company may have, prior to filing for bankruptcy, made a contractual promise to pay an employee a lump sum payment on termination, regardless of the employee's length of employment with the debtor. These types of payments often promise thousands, if not millions of dollars, and are negotiated on an individual basis in employment agreements with company executives,[96]

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[93] See Matson v. Alarcon (In re LandAmerica Fin. Grp., Inc.), 435 B.R. 343, 346 (Bankr. E.D. Va. 2010) ("[E]mployees who were with the company for more than six months but less than one year whose employment was terminated . . . were entitled to one week's pay. Terminated employees who were with the company for one year or more but less than two years were entitled to two weeks' pay.").

[94] Most severance policies require an employee is not terminated "for cause," to receive payment. George W. Kuney, Hijacking Chapter 11, 21 Emory Bankr. Dev. J. 19, 83 (2004) ("Typically, the beneficiary receives nothing under a severance package if the employee is terminated for cause—including bad faith—or for voluntary separation from the debtor.").

[95] Employees subject to a company-wide severance policy are usually at-will employees. Thus, under the widely-recognized Countryman test to determine executory contract status, the employee is not considered to have a material unperformed obligation such that failure to complete performance would constitute a breach of an agreement between an employee and employee. See Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973); see also In re Metalsource Corp.,163 B.R. 260, 268 (Bankr. W.D. Penn. 1993). A court will move past an executory contract analysis to evaluate if amounts owed under the policy are administrative or priority claims. Id. One may argue that additional requirements for employees to receive severance pay—signing away the ability to sue, continuing to perform such that the employee is not fired "for cause"—constitute material unperformed obligations such that the contract should be considered executory. Yet, employee severance policies often also stipulate that the "[s]everance [p]rogram may be modified, amended, suspended, canceled, or terminated by the Debtors, in their sole discretion and to the maximum extent allowed by law," Employee Wages Motion, para. 77, In re Chinos Holdings, Inc., No. 20-32181 (KLP) (Bankr. E.D. Va. May 4, 2020) (No. 22), leaving little actual obligations on the employer side of the agreement.

[96] Employment agreements of senior executives now commonly contain "golden parachute" provisions which entitle the executive "to receive a substantial lump-sum payment" when "the executive is terminated 'without cause' or if there is a 'change in control' of the company." Jarvinen, supra note 92, at 10. See, e.g., In re Phones for All, Inc., 249 B.R. 426, 427-28, 31 (Bankr. N.D. Tex. 2000) ($432,601.65 claim for severance arising out of an employment contract between the debtor and its executive vice president); In re AppliedTheory Corp., 312 B.R. 225, 228 (Bankr. S.D.N.Y. 2004) ($2.4 million in severance payments arising under prepetition negotiated employee agreements of five debtor executives); In re Health Diagnostic Lab., Inc., 557 B.R. 885, 890-91 (Bankr. E.D. Va. 2016) ($2.9 million in severance claims arising from an employment agreement with two former board members); In re Hooker Inv., Inc., 145 B.R. 138 (Bankr. S.D.N.Y. 1992) ($4 million in severance payments under the employment agreement of the CEO of a debtor subsidiary).

whereas length-of-service severance plans are typically broadly applicable to the company's rank-and-file employees.[97] The concern of this Note is not compensation awarded to managerial and executive level employees, [98] but rather the treatment of relatively modest severance payments due to rank-and-file in bankruptcy. These payments are analyzed very differently under the Bankruptcy Code and implicate very different normative issues.[99] The salient point regarding these payments is that prepetition contractual entitlements owed to executives are rarely deemed subject to any type of priority status. Executives must—and very often do—negotiate new agreements for severance benefits, subject to objections of various stakeholders and specifically designed statutory provisions, after their employer files for bankruptcy.[100]

1. *Administrative Expense Status for Severance Based on Length of Service*

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[97] In re Endo Int'l plc, No. 22-22549 (JLG), 2022 WL 16935997, *5 (Bankr. S.D.N.Y. Nov. 14, 2022) (analyzing a "severance policy applicable to Employees that are not subject to individual agreements with the Company" which includes compensation that "varies depending on the Employee's position and length of service"); In re ADI Liquidation, Inc., 560 B.R. 105, 107 (Bankr. D. Del. 2016) ("AWI had a policy offering . . . employees who were permanently laid off certain severance benefits based upon their years of continuous service.").

[98] Donald C. Dowling, Jr., The Intersection Between US Bankruptcy and Employment Law, 10 Lab. Law 57, 61 (1994) (noting that, except for "highly compensated executives who had the foresight and bargaining power to secure definite-term contracts," employment contracts are rare").

[99] Special restrictions are imposed on severance payments and other types of compensation awarded to "insiders" in bankruptcy. Directors and officers, as statutory "insiders" under section 101(31)(B) of the Code, are restricted from receiving severance unless the payment is part of a program applicable to all full-time employees and not "greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made." Bankruptcy Code § 503(c), § 101(31)(B) (2018). These limits do restrict compensation to the board of director and "c-suite" executives, but many high-level management employees are not captured by these provisions.

[100] In re Phones for All, 288 F.3d 730, 732 (5th Cir. 2002) (finding, in the case of an executive vice president due $165,000 under a prepetition employment agreement, that it was "the claimant['s] burden to reconfirm or renegotiate post-petition any severance packages they may have if they continue to work for the debtor"). The reorganization process often contemplates the eventual termination or replacement of existing management, and thus to incentivize executives to continue to energetically assist with the reorganization, they are often provided financial incentives. See Dorothy Hubbard Cornwell, To Catch A KERP: Devising More Effective Regulation than § 503(c). 25 Emory Bankr. Dev. J. 485, 489 (2009). Others view these bonuses as "management abusing the basic structure of Chapter 11 to extract undeserved pay." See Jared A. Ellias, Regulating Bankruptcy Bonuses, 92 S.C. L. Rev. 653, 654, 661 (2019). Such agreements, known today as KEIPs ("key employee incentive plans") have been the subject of attempted reform and regulation, with debated success. See id. at 654, 664.

For a severance payment to constitute an administrative expense, the *Mammoth Mart* test demands that the "debtor-in-possession's actions give rise to [the] legal liability."[101] To apply this test, courts must reach a conclusion regarding what consideration underlies employee severance pay claims, i.e., what gives rise to the legal liability. The two prevailing views on this question reach very different conclusions, which have vastly different implications for the portion of the severance claim given priority status.[102]

The Third Circuit in *In re Public Ledger* set out the basic framework for analyzing different types of severance payments, which remains the law in many circuit courts today.[103] *Public Ledger* found severance pay based on an employee's length of service is "earned each day of the [employee's] service," and thus only the "portion which was . . . earned [postpetition] should be given the priority due to administrative expense."[104] It follows that severance pay which comes due on termination is not considered a payment in exchange for the hardship of termination, arising when the employee is fired. Instead, *Public Ledger* considers the payment an administrative expense only to the extent the amount was "earned" in the period an employee provided service to the bankrupt company postpetition.[105] Thus, only a small portion of the claim—the amount attributable to employment with the bankrupt company—is an administrative claim, with severance earned for the many years of service prior to filing relegated to unsecured claim status.

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[101] In re Mammoth Mart, Inc., 536 F.2d 950, 955 (1st Cir. 1976).

[102] See infra, notes 114-117.

[103] In re Public Ledger, Inc., 161 F.2d 762, 773 (3d Cir. 1947); see also Jarvinen, supra note 92, at 12 (noting the traditional framework for severance pay as primarily established by *Public Ledger*).

[104] *Public Ledger, Inc.*, 161 F.2d at 773.

[105] See id. at 773 (holding that, because "the discharge pay . . . is premised on length of service" "that portion which was so earned under the trustees' management [postpetition] should be given the priority due to administrative expense").

The minority view is set out in *Straus-Duparquet, Inc. v. Local Union No. 3, International Brotherhood of Electrical Workers*,[106] in which the Second Circuit held the entire severance payment is entitled priority status as an administrative expense, premised on an understanding that severance pay is "a form of compensation for the termination of the employment relation" and thus is "earned" when the employee is terminated."[107] This view analyzes a severance payment, even one which varies based on the employee's tenure with the company, as a payment "primarily to alleviate the consequent need for economic readjustment but also to recompense him for certain losses attributable to dismissal."[108] Because, under this understanding, severance is compensation for the "losses attributable to dismissal," and thus earned on dismissal, the entire amount is entitled to administrative expense status.[109] This analysis, adopted in 1967, remains the view of the Second Circuit today.[110]

The First Circuit in *In re Mammoth Mart,* decided after both *Public Ledger* and *Straus-Duparquet*, adopted and clearly set out the analysis that severance pay based on length of service arises "based entirely upon services performed by [employees]," rather than as compensation for losses attributable to dismissal.[111] The *Mammoth Mart* court concluded that "[b]ecause the amount of the severance pay claims depends upon the length of employment, the consideration

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[106] 386 F.2d 649 (2d Cir. 1967).
[107] *Straus–Duparquet,* 386 F.2d at 651.
[108] Id.
[109] Id.
[110] See In re Bethlehem Steel Corp., 479 F.3d 167, 173 (2d Cir. 2007) (acknowledging the continued applicability of the *Straus-Duparquet* analysis of severance pay); In re Golden Distrib., Ltd., 152 B.R. 35, 36 (Bankr. S.D.N.Y. 1992) (noting "clear Second Circuit case law, the effect that severance pay, in its entirety, is entitled to first priority administrative expense status for the reason that severance pay is compensation for the event of termination and unlike wages, dos not accrue on a per diem basis"); see also In re Spectrum Info. Tech., Inc., 193 B.R. 400, 407 (Bankr. S.D.N.Y. 1996) (noting the Second Circuit's finding that "compensation of severance payments" "is intended to compensate employees for the hardships attributable to termination and is earned when the employee is dismissed").
[111] In re Mammoth Mart, Inc., 536 F.2d 950, 955 (1st Cir. 1976).

supporting appellants' claims was the services performed for Mammoth Mart"[112] and "only that portion of the severance pay claim which can be apportioned to services performed after the filing . . . may be afforded [administrative] treatment." In practice, this analysis means that if a company policy allows for one week's salary in severance for each year of service with the company, the severance payment must be prorated for the period of time the employee was employed after the bankruptcy filing.[113]

As an example, consider Jane Doe, an employee who, per company policy, receives one week's salary as severance pay for each year of service with the company. Jane has worked for the company for ten years. If Jane's annual salary is $65,000, each additional week of severance is worth about $1,250 ($65,000 / 52 weeks). Upon termination, Jane is due ten weeks of pay, or $12,500. This is a fairly common scheme.[114] However, under the limits imposed under the *Public Ledger*/*Mammoth Mart* analysis, hereinafter referred to as the accrual approach, if Jane was terminated one month after the bankruptcy filing, only the period of time when Jane was employed with the company will "accrue" administrative priority severance.[115] Thus, if every

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[112] Id. at 955, 953.

[113] Courts have undertaken these calculations in slightly different ways, with the sometimes involved equations set out in court opinions. In *In re Yarn Liquidation, Inc.* the court notes "problem of calculating the amount of severance pay earned during [the] period," explaining "more than one method can be used" to "determine[] the rate at which severance pay was earned over time." 217 B.R. 544, 548 (Bankr. E.D. Tenn.). The court ultimately "uses days of employer after [the petition date] as the numerator and 365 as the denominator of the fraction" multiplied "by one-half week's salary" as the company policy allocated one-half week of salary for each year of service. Id. at 549.

[114] See e.g., Employee Wages Motion, para. 61, In re Paper Source, Inc., No. 21-30660 (Bankr. E.D. Va. Mar. 2, 2021) (No. 15) (Pursuant to the company guidelines, store and distribution center management Employees are eligible for a minimum of two weeks of base salary and an additional week for every year of service); Employee Wages Motion, para. 44, In re Sears Holdings Corp., No. 18-23538 (RDD) (Bankr. S.D.N.Y. Oct. 15, 2018) (No. 31) (providing that "upon a qualifying termination, eligible Program Participants are paid 1 week's base pay for every year of service").

[115] "[A]dministrative expense priority can be afforded only to that portion of the benefit that was actually earned by services provided (i.e., *accrued*) during the post-petition period." In re Russell Cave Co., Inc, 248 B.R. 301, 303 (Bankr. E.D. Ky. 2000) (emphasis added). This is as opposed to *Straus-Duparquet's* holding, that severance does not "accrue" on a per diem basis. Straus-Duparquet, Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 386 F.2d 649, 951 (2d Cir. 1967).

year of Jane's employment adds another week's salary to her severance payment, the month of employment during the bankruptcy allows Jane 1/12th of the week's salary she would accrue over the year, or about $104,[116] as an administrative expense payment. The remaining $12,396 will be considered an unsecured claim.[117]

Setting aside the fractions, as many lawyers would prefer to do, the important point is that the accrual approach allows administrative expense status to only a small portion of the employee's severance claim. The longer an employee was employed with the company, the more the employee is relatively disadvantaged.[118] This approach yields a very different result than that under the Second Circuit, which would find Jane's entire $12,500 severance payment as entitled to administrative expense priority,[119] as the amount was awarded on termination as compensation for the economic loss attributable to dismissal.

2. *Wage Priority Status for Severance Based on Length of Service*

To add complexity, courts must also consider the import of wage priority status under § 507(a)(4) in determining the priority status of length-of-service severance claims.[120] Employee severance payments will receive preferential treatment as wage priority claims under § 507(a)(4), which elevates "severance" "earned by an individual" "within 180 days before the filing of the petition" to priority status ahead of the general class of unsecured claims.[121] Because this priority

[116] $1,250 severance accrued annually, prorated to a one-month accrual, is $1,250 x 1/12 = $104.17.

[117] $12,500 total severance due for one weeks of severance pay due for each year of service, less $104, is $12,396.

[118] Because Jane Doe was employed for ten years, allowing one month of prorated severance as administrative, amounts to less than 1% of what she was otherwise entitled to. John Doe, employed for one year, would receive about 8% of what he was otherwise entitled to (the same $104 administrative severance amount, compared to a total claim of $1,250).

[119] See supra notes 79-81 and accompanying text.

[120] See supra section II.B.2.

[121] Bankruptcy Code § 507(a)(4) (2018).

status applies only to amounts "earned within 180 days"[122] of the bankruptcy, the same timing issues which complicate administrative expense status emerge in the context of wage priority claims. This provision of the Code affects only a narrow class of creditors—employees—and is thus less commonly litigated.[123] Perhaps as a result, courts often simply import the logic employed for administrative claims to determine wage priority claim status.[124]

Courts which apply the accrual approach to determine what portion of length-of-service severance is entitled to administrative status, import and apply the same test to wage priority severance, prorating the amount of severance pay subject to priority status based on how long the employee worked during the 180-day period.[125] An employee terminated prepetition will be allowed a priority claim for severance accrued in the applicable prepetition period. But if an employee is terminated postpetition, courts will allow severance accrued for the period worked postpetition as an administrative priority claim, as well as severance accrued in the 180 days

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[122] Id.

[123] Dana Hall, In the Fourth Circuit, Terminated Employees Are Entitled to Priority Claim for Severance. Why? Because They Earned It (When They Were Fired), Weil Restructuring (Jul. 21, 2011), https://restructuring.weil.com/claims/in-the-fourth-circuit-terminated-employees-are-entitled-to-priority-claim-for-severance-why-because-they-earned-it-when-they-were-fired/ ("[T]he 507(a)(4) issue in *LandAmerica* is not as often litigated as its 503(b) counterpart. . . .").

[124] See In re Yarn Liquidation Inc., 217 B.R. 544 (Bankr. E.D. Tenn. 1998) (noting administrative expense priority requires a benefit "furnished to the debtor during the bankruptcy case" and asserting that "[l]ikewise, when severance pay is based on length of service, it is entitled to [] priority under § 507(a)(3) only to the extent it was earned within the [statutory period] before the date of bankruptcy."); In re Roth Am., 925 F.2d 949, 951 (3d Cir. 1992) (affirming a decision of the lower bankruptcy court to allow length of service employee severance claims prepetition earned within the statutory wage priority period); In re Russell Cave Co., Inc., 248 B.R. 301 (E.D. Ky. 2000) (same); but see Matson v. Alarcon (In re LandAmerica Fin. Grp., Inc.), 651 F.3d 404, 10 (4th Cir. 2011) (applying a different analysis to how severance is "earned" for wage priority severance section 507(a)(4) than the circuit applies to determine if severance pay is due administrative expense priority).

[125] See *Russell Cave*, 248 B.R. at 303-04 ("[T]he majority of courts have ruled that section 507(a)(3) requires that only those employee benefits actually earned during the 90-day period immediately preceding the filing of a petition are entitled to priority in payment."). See also In re Roth Am., Inc., 975 F.2d 949, 954 (3d Cir. 1992) (upholding the treatment of prepetition severance benefit claims as entitled to wage priority status); *Yarn Liquidation*, 217 B.R. at 546 (Bankr. E.D. Tenn. 1998).

prepetition as a wage priority claim.[126] For Jane Doe, things may not be as bad as they previously seemed. Now, in addition to the one month of severance accrued postpetition allowed administrative status, most courts would also allow Jane a wage priority claim for severance accrued 180 days prior to the bankruptcy filing date. To continue the illustrative example employed supra, in section II.C.1 of this Note, Jane Doe will be entitled to about $616 for the wage priority portion of her severance accrued in the 180 days prepetition,[127] plus the $104 allowed as an administrative expense payment,[128] Jane would now have a total priority status claim of about $721, with the remaining $11,779 unsecured.

The Second Circuit, interpreting severance as entirely "earned" upon the date of termination, finds that severance payments of an employee terminated in the 180 days prior to bankruptcy is subject, in its entirety, to wage priority status.[129] Unlike administrative severance payments, prepetition wage priority payments are capped at $15,150 per the statutory limit on such claims.[130]

The Fourth Circuit, which applies the accrual approach to administrative severance,[131] reaches a different result when applying wage priority status to severance payments. In *Matson v.*

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[126] In re Public Ledger, 161 F.2d 762, 744 (finding "that part earned under the administration of the trustees is entitled to priority as administration expenses . . . [and] [t]hat part earned within the [wage priority section] is entitled to the priority provided for that section"); see also, *Russell Cave*, 248 B.R. at 303.

[127] $1,250 severance accrued annually, prorated to a 180-day accrual is $1,250 x 180/365 = $616.43.

[128] Supra note 116 and accompanying text.

[129] The Second Circuit's analysis of severance as earned upon termination has likely precluded any serious attempt to limit severance stemming from prepetition termination to only that which is "accrued" in the statutory wage priority period. Debtor counsel in cases filed in the Southern District typically request the ability to pay "severance benefits up to the statutory cap" for prepetition terminated employees. See e.g., Employee Wages Motion, para. 21, In re Nine West Holdings, Inc., No. 18-10947 (SCC) (Bankr. S.D.N.Y. Apr. 6, 2018) (No. 9) (requesting authority to pay "approximately $1.4 million" in "unpaid obligations under the Non-Insider Severance Program"); Employee Wages Program, para. 23, In re Revlon, Inc., No. 22-10760 (DSJ) (Bankr. S.D.N.Y. June 16, 2022) (No. 8) (requesting the authority to pay $1.26 million in prepetition severance benefits).

[130] Supra note 58 and accompanying text.

[131] In re Dornier Aviation (N. Am.), No. 2-82003 (SSM), 2002 WL 31999222, *6 (Bankr. E.D. Va. Dec. 18, 2002) (concluding the analysis of severance pay set forth in *Mammoth Mart* should be applied to limit the postpetition obligations imposed on debtors and avoid preferential treatment to certain creditors).

Alarcon, the court concludes that "employees receive 'severance pay' as compensation for the injury and losses resulting from the employer's decision to terminate the employment relationship," and therefore "an employee 'earns' the full amount of 'severance pay' on the date the employee becomes entitled to receive such compensation."[132] While the *Matson* court cites *Straus-Duparquet*, a case analyzing administrative severance for their analysis of when severance pay is "earned," for their understanding of what "triggering events" give rise to severance pay,[133] the court is careful to find this holding applies only to an analysis of the application of wage priority status to severance pay.[134]

The *Matson* court claimed its holding was premised on a specific analysis of the language of the wage priority provision of the Code, section 507(a)(4), focusing on the statute's provision of priority status to "claims . . . *earned* within 180 days"[135] of the bankruptcy. This is as opposed to the statute for administrative severance, which the *Matson* court notes does not use the word "earned" but instead provides administrative expense status for "*services rendered* after the commencement of the case."[136] This is a curious line to draw, considering much of the case law explicating the reasoning for applying the accrual approach to severance as an administrative payment, specifically supports the analysis by claiming severance pay based on length of service, is "earned" over time.[137] *In re Public Ledger*, the case establishing the accrual approach to

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[132] Matson v. Alarcon (In re LandAmerica Fin. Grp., Inc.), 651 F.3d 404, 409 (4th Cir. 2011) (quoting Bankruptcy Code § 507(a)(4) (2018)) (citing Straus-Duparquet, Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 386 F.2d 649, 651 (2d Cir. 1967)).

[133] *Matson*, 651 F.3d at 409.

[134] See id. at 410.

[135] *Matson*, 651 F.3d at 408 (quoting Bankruptcy Code § 507(a)(4)) (emphasis added)).

[136] *Matson*, 651 F.3d at 410; Bankruptcy Code § 503(b)(1)(A) (emphasis added).

[137] See e.g., In re Roth Am., Inc., 975 F.2d 949, 951 (3d Cir. 1992) (affirming the lower bankruptcy court in allowing only those claims "for the amount of severance . . . *earned* post-petition") (emphasis added) (internal quotations omitted); In re Health Maint. Found., 680 F.2d 619, 622 (9th Cir. 1982) (analyzing when the severance pay was earned as the "scope of relevant consideration"); In re Uly-Pak, Inc. 128 B.R. 783, 767 (Bankr. S.D. Ill. 1991) (explaining that when "analyzing employee benefits" to determine administrative status" "the determinative factor is not when the right to payment matured, but, rather, when it was *earned*") (emphasis added); In re Yarn

determining administrative expense status of length-of-service severance, describes the portion subject to administrative expense priority as "that part *earned* under the administration of the trustees."[138] This wrinkle added by the *Matson* court has not been widely adopted by other circuit courts, but emphasizes the continued disagreement in how these provision should be applied, over half a century after the majority analysis was established in *In re Public Ledger*.[139]

B. *One-Size-Fits-None: Critiques of the Majority and Minority Approach*

The majority and minority applications of the bankruptcy priority framework to rank-and-file employee severance payments are each imperfect solutions, attempting to force severance payments to fit neatly into the Bankruptcy Code's framework. This section argues each of these interpretations at times fails to carry out "the two recognized policies underlying Chapter 11, preserving going concerns and maximizing property available to satisfy creditors."[140]

1. *The Majority Approach*

The majority approach, which allows a priority claim for length-of-service based severance accrued during the postpetition period and the 180-day prepetition priority period,[141] does ensure the debtor is not saddled with substantial obligations to the detriment of its rehabilitation or other

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Liquidation, Inc., 217 B.R. 544, 547 (Bankr. E.D. Tenn. 1997) ("The majority rule . . . cases focus on whether severance pay was earned before or during the bankruptcy case . . . [which] depends on whether it arose from services provided by the employee before or during the bankruptcy case.").

[138] In re Public Ledger, 161 F.2d 762, at 744 (3d Cir. 1947) (emphasis added).

[139] Id. One relevant case citing to Matson is *In re ADI Liquidation, Inc*. In re ADI Liquidation, Inc., 560 B.R. 105 (Bankr. D. Del. 2016). The ADI Liquidation court finds that the employee's "*eligibility* for severance accrued over time, but he *earned* or became entitled to severance only upon termination of his employment," citing both *Straus-Duparquet* and *Matson* for this proposition. Id. at 109 (emphasis added). Interestingly, this is a Delaware case—a jurisdiction which, under *In re Roth American, Inc.*, adheres strictly to an understanding of length-of-service severance as earned over time, rather than earned on termination. 975 F.2d 949, 951 (3d Cir. 1992). *Roth American* itself prorated severance in the priority period based on the portion "earned" during the statutory window—yet *ADI Liquidation* brushes of this precedent as applying only to administrative expense status, rather than priority severance, and therefore inapplicable. *ADI Liquidation*., 560 B.R. at 109 n.22 (Bankr. D. Del 2016).

[140] Bank of Am. Nat. Trust and Sav. Ass'n v. 204 N. LaSalle St. P'ship, 526 U.S. 434, 435 (1999).

[141] See supra section II.A.2.

creditors.[142] It is important to note, however, that in many circumstances, debtors can and do alter their severance policies in bankruptcy to reduce amounts due to employees.[143] Thus, narrow interpretations of the statutory priorities to minimize payments under rank-and-file severance policies are often not essential to protect the debtor from burdensome postpetition obligations. There remain, however, situations where a debtor is faced with tight liquidity constraints and cannot alter severance agreements because the provisions are part of a collective bargaining agreement,[144] an individual contract,[145] or because the debtor terminated the employees prior to altering company severance policies.[146] In such circumstances, limitations on the priority amount of severance payments in bankruptcy, with the remainder of the claim sharing equally with all other unsecured claims, may sometimes be required to further goals of rehabilitation and maximize creditor value.[147]

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[142] See In re Grant Broad. of Philadelphia, Inc., 71 B.R. 891, 897 (Bankr. E.D. Pa. 1987) ("We do not consider it to have been the intent of Congress, in enacting § 503(b)(1)(A), to saddle debtors with special post-petition obligations lightly or give preferential treatment to certain select creditors by creating a broad category of administrative expenses.")

[143] See, e.g., Proof of Claim #544, at 8, In re BBGI US Inc., No. 20–11785 (CSS) (Bankr. D. Del. Sept. 22, 2020), available at https://cases.ra.kroll.com/brooksbrothers/Home-ClaimInfo (search "544") (describing the process by which the debtor, Brooks Brothers, amended the company severance plan to decrease awards during the course of the bankruptcy); Employee Wages Motion, para. 77, In re Chinos Holdings, Inc., No. 20-32181 (KLP) (Bankr. E.D. Va. May 4, 2020) (No. 22) ("The Non-Insider Severance Program may be modified, amended, suspended, canceled, or terminated by the Debtors, in their sole discretion and to the maximum extent allowed by law.").

[144] See, e.g., In re Roth Am., 975 F.2d 949, 958 (3d Cir. 1992) (finding that severance pay under a collective bargaining agreement must be accorded priority status only to the extent it was accrued in the prepetition priority period and the postpetition administrative period).

[145] See e.g., In re Spectrum Info. Tech., Inc., 193 B.R. 400, 407 (Bankr. E.D.N.Y. 1996) (holding that $75,000 in severance due under an executive's employment agreement was entirely entitled to administrative status under *Straus-Duparquet*).

[146] In *Matson v. Alarcon*, the debtor company's board of directors "retained the unilateral right to "modify, alter, or amend the plan . . . or to eliminate the plan entirely." 651 F.3d 404, 407 (4th Cir. 2011). The company terminated 124 employees in the 180 days prior to filing, but were not paid the severance compensation (based on length of service) due under the plan. Id. The *Matson* court, discussed supra section II.A.1.ii, deviated from the Fourth Circuit accrual method and held the entire severance claim was entitled wage priority status, noting their conclusion was supported by the fact that the board "retained the right to amend the plan or eliminate it entirely." Id. at 410.

[147] In re Gateway Apparel, Inc. 238 B.R. 162, 165 (Bankr. E.D. Mo. 1999) (finding that regardless of authorization to pay employee severance in the first-day order, because the debtor was unable to reorganize and is likely facing administrative insolvency, "equity supports the determination that the full amount of any severance claims are not to be allowed as priority expenses of administration"); see also In re U.S. Metalsource Corp., 163 B.R. 260, 263 (Bankr. W.D. Pa. 1993) (noting that once it became apparent that the company would not successfully

Yet when the debtor's workforce is necessary to effect a liquidation of closing stores,[148] or assurances are required to stem employee attrition from a struggling company,[149] the promise of an additional payment upon termination can ensure employees stay on to help ensure an orderly wind down or successful reorganization. A formal interpretation of the majority rule limits the debtor's ability to make severance payments in such situations, even when continuing these plans would help maximize company value.[150]

2. *The Minority Approach*

The minority approach understands severance as entirely earned when an employee is terminated, allowing the full amount as priority if the employee is terminated within the statutory period.[151] Allowing the full severance payments of employee creditors priority above other unsecured creditors does not, in every situation, contribute to the reorganization of the company or maximize creditor recoveries.[152] Additionally, while there are strong policy reasons to provide

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reorganize, the creditors committee should have requested a change to the debtor's policy of providing full severance pay). Additionally, if companies with generous severance policies in the ordinary course of business are unable to limit these policies when faced with severe financial distress, companies are incentivized to curtail these benefits even when financially stable.

[148] See Employee Wages Motion, para. 55-56, In re Craftworks Parent, LLC, No 20-10475 (BLS) (Bankr. D. Del. Mar. 3, 2020) (No. 5) (requesting permission to maintain the severance program, citing possible instability in the workforce if the debtors are unable to pay future severance for twenty-six store closures); Employee Wages Motion, para. 13, In re Radioshack Corp., No 15-10197 (KJC) (Bankr. D. Del. Feb. 5, 2015) (No. 6) (noting the debtor's intent to pursue authority for payment to "employees at store that are subject to store closing and liquidation sales").

[149] See In re Endo Int'l plc, No. 22-22549 (JLG), 2022 WL 16935997, *10 (Bankr. S.D.N.Y. Nov. 14, 2022) (noting the important purpose the severance plan serves in retaining talent, in situation where the employees are aware of the company's distressed situation and the possibility of future reductions in force); Employee Wages Motion, para. 93, In re Pier 1 Imps., Inc., No. 20-30805 (KRH) (Bankr. E.D. Va. Feb. 17, 2020) (No. 27) ("Increased instability in the Debtors' workforce will only undermine the Debtors' ability to strengthen their financial foundation . . . [and] unanticipated attrition will require the Debtors to expend additional resources and capital in maintaining their operations.").

[150] In re the Levinson Steel Co., 117 B.R. 194, 195-96 (Bankr. W.D. Pa. 1990) (denying the debtor company's request to "to treat all severance pay claims as Chapter 11 administrative expenses, whether the services entitling the employee to the severance benefit were performed pre-petition or post-petition" in order to "retain qualified employees" during the reorganization).

[151] Supra section II.A.1.

[152] See, e.g., In re U.S. Metalsource Corp., 163 B.R. 260, 263 (Bankr. W.D. Pa. 1993) (noting that once it became apparent that the company would not successfully reorganize, the creditors committee should have requested a change to the debtor's policy of providing full severance pay).

modest preferences for employee creditors,[153] when balanced against the centrality of equality of distribution in bankruptcy, priority for severance claims is not always justified.[154] This tension is clear when courts following the minority approach are confronted with large executive severance bonuses. While the underlying reasoning of the minority approach, that severance is earned on termination,[155] seems to dictate that these amounts must be entirely administrative expenses, courts have instead found it necessary to work around the natural outgrowth of this premise and distinguish the *Straus-Duparquet* understanding of severance to apply only to modest employee payments rather than large executive bonuses.[156] Thus, like the majority approach, *Straus-Duparquet's* minority approach fails to provide a solution which furthers bankruptcy policy across common issues faced in bankruptcy courts.

C. *Judicial Discretion: Allowing Employee Payments Outside of Priority*

Given that neither application of the Bankruptcy Code to severance pay claims consistently allows policies necessary to ensure a successful rehabilitation or wind down of the business, debtors often argue for the ability to pay these amounts during the course of the bankruptcy when supported by sound business judgment, and thus permitted under § 363(b) and § 105(a).[157] Through motions filed with the bankruptcy court early in the proceeding,[158] debtor companies

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[153] Supra section II.A.1.ii.

[154] See In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976) (finding that giving "priority to a claimant not clearly entitled thereto is [] inconsistent with the policy of equality of distribution").

[155] Straus-Duparquet, Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 386 F.2d 649, 651 (2d Cir. 1967).

[156] See In re AppliedTheory Corp., 312 B.R. 225, 243-246 (Bankr. S.D.N.Y. 2004) (finding the executive severance bonuses at issue were "not the same kind of 'severance pay' whose payment was authorized by the Second Circuit in *Straus-Duparquet*").

[157] See supra notes 76--81 and accompanying text. See also, e.g., In re Endo Int'l plc, No. 22-22549 (JLG), 2002 WL 16935997, *5 (Bankr. S.D.N.Y. Nov. 14, 2022).

[158] In re Drexel Burnham Lambert Grp., Inc. 138 B.R. 687, 711 (Bankr. S.D.N.Y. 1992) ("A claim for two weeks' pay is different, not just in degree, but in kind, from a claim for multiple years' salary and bonus. The fact that a claim for the former was allowed [in *Straus-Duparquet*] is no authority for allowing the latter."); In re Jamesway Corp., 199 B.R. 836, 841 (Bankr. S.D.N.Y. 1996) (distinguishing amounts due under an employment agreement from severance pay, due to the fact that such payments were "not labeled 'severance pay' and lack the typical characteristics of severance pay"); In re Hooker Inv., Inc., 145 B.R. 138, 147 (Bankr. S.D.N.Y. 1993)

request to continue prepetition severance plans for employees regardless of the Bankruptcy Code's strict limits on prepetition payments.[159] The continuation of these plans is subject to negotiations between the debtor company, committees representing unsecured creditor interests, committees representing secured lenders, and the U.S. Trustee's office, with employee interests rarely separately represented.[160] As a result, such plans are often subject to notice requirements and caps imposed by these constituencies.[161] These consensual solutions set aside the technical calculations required to apply the majority's accrual approach, and instead pay prepetition and postpetition accrued obligations as considered "critical to maintaining [e]mployee morale and loyalty."[162]

In re Pier 1 Imports, Inc.,[163] provides one example of such practices. Pier 1 planned to terminate employees in connection with the closure of "up to 450 of their stores."[164] The

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(denying administrative expense priority to $4 million claim for termination of an employment contract, in part by characterizing the amounts as "damages" rather than as severance pay); but see In re Spectrum Info. Tech., Inc., 193 B.R. 400, 407 (Bankr. E.D.N.Y. 1996) (holding that $75,000 in severance due under an executive's employment agreement was entirely entitled to administrative status under *Straus-Duparquet*).

[159] E.g., Employee Wages Motion, para. 92, 94, In re Pier 1 Imps., Inc., No. 20-30805 (KRH) (Bankr. E.D. Va. Feb. 17, 2020) (No. 27). While such requests provide the debtor to discretion to make such payments, a debtor may still later decide to forgo making such payments. In re Metro Affiliates, Inc., No. 12-12591 (SHL), 2014 WL 3767552, *2 (Bankr. S.D.N.Y. July 31, 2014).

[160] To protect the interests of unsecured creditors, the Bankruptcy Code requires the U.S. Trustee appoint a committee of unsecured creditors soon after the case is filed. Bankruptcy Code § 1102(a)(1) (2018). These committees are composed those holding the seven largest unsecured clams who are willing to serve. Bankruptcy Code § 1102(b)(1). In addition to the official committee of unsecured creditors, groups of stakeholders with similar claims may also collaborate to pursue their interests, including as bondholders, tort claimants, secured loan syndicates. See No More Ad Lib: The Nuts & Bolts of Ad Hoc Bankruptcy Committees, ABA (Dec. 17, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/12/02_kevane/. In lieu of union representation, the unsecured creditors committee represents employee interests, but "[e]mployees are likely to have interests that differ significantly from those of typical creditors." Korobkin, supra note 6, at 16.

[161] Employee Wages Motion, para. 11, In re Tailored Brands, Inc., No. 20-33900 (MI) (Bankr. S.D. Tex. Aug. 3, 2020) (No. 23) ("Before making any payments pursuant to the . . . Employee Severance Program in excess of $50,000 to any individual, the debtor shall provide five (5) days' advance notice . . .[and] a matrix [of relevant related information] to the U.S. Trustee and any statutory committee appointed . . . .").

[162] E.g., Employee Wages Motion, para. 49, In re Lakeland Tours, LLC, No. 20-11647 (JLG) (Bankr. S.D.N.Y. July 21, 2020) (No. 14).

[163] No. 20-30805 (KRH) (Bankr. E.D. Va. Feb. 17, 2020).

[164] Store Closing Motion, para. 6, In re Pier 1 Imps., Inc., No. 20-30805 (KRH) (Bankr. E.D. Va. Feb. 17, 2020) (No. 24).

company estimated these actions would result in "up to approximately $13.82 million" in payments related to the employee severance benefits plan.[165] While these obligations were based on an employee's length of service, the company nevertheless requested permission through the employee wages motion to continue the programs and pay these obligations in full, citing concerns of "[i]ncreased instability in the Debtors' workforce" undermining the reorganization process.[166] This request runs counter to the strict limits case law in the Eastern District of Virginia places on severance payments, granting administrative expense status only to severance payments accrued during the priority periods.[167] The debtor's instead argued "[s]ection 363(b) of the Bankruptcy Code" in conjunction with "section 105(a) and the doctrine of necessity," permit the payment of these prepetition claims.[168]

The judge's order did not simply approve the request without adjustments.[169] Rather than authorizing the entire $13.82 million amount, Pier 1 was authorized to pay only 50% of an individual employee's severance obligations, up to an aggregate cap of $3.4 million, with an additional $1.6 authorized for Canadian-based employees.[170] The order emphasizes such payments are "[s]ubject to agreement with the DIP Lenders and the Term Lenders[] and . . . consultation with the [unsecured creditors] Committee," and that such amounts must be included "in any subsequent budget controlling these chapter 11 cases."[171] *Pier 1* has been cited in several subsequent cases filed in the Eastern District of Virginia seeking similar permissive treatment of

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[165] Employee Wages Motion, paras. 92, 94, In re Pier 1 Imps., Inc., No. 20-30805 (KRH) (Bankr. E.D. Va. Feb. 17, 2020) (No. 27) [hereinafter Pier 1 Employee Wages Motion].

[166] Id. para. 93.

[167] In re Dornier Aviation (N. Am.), No. 2-82003 (SSM), 2002 WL 31999222, *6 (Bankr. E.D. Va. Dec. 18, 2002).

[168] Pier 1 Employee Wages Motion, para. 102.

[169] Order Authorizing the Employee Wages Motion, para. 5, In re Pier 1 Imps., Inc., No. 20-30805 (KRH) (Bankr. E.D. Va. Mar. 12, 2017) (No. 305).

[170] Id.

[171] Id.

severance payments, including *In re Toys "R" Us, Inc.*,[172] and *In re Guitar Center, Inc*.[173] From these decisions, it is clear that while the Eastern District of Virginia, a popular venue for business debtors,[174] limits claims for severance pay under recent case law,[175] bankruptcy courts will consider practical concerns and honor negotiated agreements among parties in determining allowed priority severance pay. Judicial approval of such processes is common across many jurisdictions that nevertheless apply the majority accrual approach to limit allowed severance claims.[176]

While the Bankruptcy Court in the Southern District of New York is operating under the Second Circuit's far more permissive rules regarding allowed priority severance pay,[177] this does

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[172] Toys "R" Us, Inc. requested approval of the court to both pay prepetition obligations for employees already terminated in the amount of $3.1 million, as well as the authority to maintain its severance program postpetition. Employee Wages Motion, para. 69, In re Toys "R" Us, No. 17-34665 (KLP) (Bankr. E.D. Va. Sept. 19, 2017) (No. 21). The program provides a minimum of "two weeks of pay for Employees who ha[ve] four or fewer years of service" plus "half a week of pay for each additional year of service up to 26 years." Id. para. 67. The Debtors' requested the ability to pay such amounts in full, which are clearly based on length of service, again to preserve "[e]mployee morale and loyalty," Id. para. 68. The final order stipulated that payments on account of the severance program "shall not exceed $10 million in the aggregate." Order Approving Employee Wages Motion, para. 4, In re Toys "R" Us, No. 17-34665 (KLP) (Bankr. E.D. Va. Oct. 24, 2017) (No. 703).

[173] In Guitar Center's employee motion, the company requested "to pay prepetition amounts owed on account of the Non-Insider Severance Program and continue, in their discretion, the Non-Insider Severance Program on a postpetition basis." Employee Wages Motion, para. 77, In re Guitar Center, Inc., No. 20-34656 (KRH) (Bankr. E.D. Va. Nov. 22, 2020) (No. 7). The motion notes "courts in this jurisdiction have permitted debtors to . . . continue existing severance programs and pay severance obligations that become due in the ordinary course to non-Insider employees who are terminated postpetition." Id. para. 91.

[174] See Corkery & Silver-Greenberg, supra note 86.

[175] In re Dornier Aviation (N. Am.), No. 2-82003 (SSM), 2002 WL 31999222, *6 (Bankr. E.D. Va. Dec. 18, 2002).

[176] The District of Delaware is bound by Third Circuit case law dictating an accrual approach to determining allowed priority severance pay. See e.g., In re Roth Am., Inc., 975 F.2d 949, 951 (3d Cir. 1992) (holding that only the portion of severance claims earned postpetition are allowed administrative expense status). The Delaware court has nevertheless allowed discretionary deviations from this application of the Code. See e.g., Employee Wages Motion, para. 68, In re Mallinckrodt, Inc., No. 20-12522 (JTD) (Bankr. D. Del. Oct. 12, 2020) (No. 8) (requesting authorization for the Debtors to continue making severance payments . . . to non-insiders in the ordinary course of business, including payment of prepetition obligations related thereto, if any."); Employee Wages Motion, para. 55-56, In re Craftworks Parent, LLC, No 20-10475 (BLS) (Bankr. D. Del. Mar. 3, 2020) (No. 5) (same). Similarly, the Southern District of Texas has allowed severance payments outside of amounts permitted based on accrual during the priority periods. Employee Wages Motion, para. 76, In re Neiman Marcus Grp. Ltd. LLC, No 20-32519 (DRJ) (Bankr. S.D. Tex. May 7, 2020) (No. 29) (Order Approved, Docket No. 69); Order Approving Employee Wages Motion, para. 3, In re IHeartMedia, Inc., No. 18-31274 (MI) (Bankr. S.D. Tex. Apr. 12, 2018) (No. 453) (approving the priority payment of prepetition severance obligations).

[177] See supra section II.B.2.

not mean such amounts will be paid without scrutiny. In *In re Endo International plc*, the U.S. Trustee vigorously contested employee benefit programs, including a severance plan, which the company was seeking to continue during the course of the bankruptcy.[178] The Bankruptcy Court upheld the plan, determining it "serve[s] an important purpose in helping the Company retain and attract talent" given that "[e]mployees . . . are aware of the Company's distressed situation" and the possibility that "their role is made redundant."[179] The court also found persuasive that the unsecured creditors committee and the committee representing tort claimant interests did not object to the employee benefit programs. The acquiescence of these stakeholders was due to a negotiated agreement capping severance payments at $17 million and requiring reporting from the debtor for severance payments beyond an aggregate threshold of $5 million in payments.[180]

As seen in the foregoing examples, common features of these plans across jurisdictions include caps limiting the individual and aggregate amounts awarded under these plans,[181] and requirements that the debtor provide periodic reporting of amounts paid and notify creditor committees and the U.S. Trustee prior to making severance payments above a certain threshold.[182] Thus, courts with very different rules regarding allowed priority severance

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[178] No. 22-22549 (JLG), 2022 WL 16935997, *5 (Bankr. S.D.N.Y. Nov. 14, 2022).

[179] Id. at *10 (internal quotations omitted) (citations omitted).

[180] Id. at *6, *11 ("[T]he Court notes that Debtors have worked closely with the UCC and OCC to address their questions and respond to diligence requests . . . [and] have made concessions to the committees and have agreed to cap payments under the plans to amounts acceptable to the committees.").

[181] See e.g., Employee Motion, para. 12, In re Radioshack Corp., No 15-10197 (KJC) (Bankr. D. Del. Feb. 5, 2015) (No. 6) (requesting postpetition severance payment limited to the "the lesser of (i) calculated severance, (ii) two weeks wages and (iii) $12,475 per individual"); supra note 28 and accompanying text; supra note 219 and accompanying text.

[182] See, e.g., Employee Wages Motion, para. 74, 76, In re Neiman Marcus Grp. Ltd LLC, No 20-32519 (DRJ) (Bankr. S.D. Tex. May 7, 2020) (No. 29) (requesting to continue the company's length-of-service severance program on a postpetition basis consistent with their prepetition practices). The court approved the continuation of the company's prepetition severance program but required that, "[b]efore making any payments under the Bonus Programs or Non-Insider Severance Program in excess of [a] $100,000 in the aggregate in any calendar month or [b] $50,000 to any individual, the Debtors shall provide five (5) days' advance notice to the U.S. Trustee, advisors to the Term Loan Lender Group . . ., and any statutory committee." Order Approving the Employee Wages Motion, para. 7, In re Neiman Marcus Grp. Ltd LLC, No. 20-32519 (DRJ) (Bankr. S.D. Tex. May 8, 2020) (No. 245). In

payments, align on a process which looks startingly similar. This does not mean the debtor's choice to file in the Second Circuit, with its more permissive rules, is without any significance. The variation in substantive law has a significant effect on the generosity of the negotiated plans. A court-approved severance program in New York is "negotiated against the backdrop of the New York rule,"[183] and thus, the starting point for negotiations is more favorable to employees. If a debtor files in the Second Circuit, and has an existing severance plan which it considers vital to reorganization, it will likely have a far easier time continuing the plan in the face of objections—if not without some back and forth with the various constituents.[184]

III. SEPARATING SEVERANCE PAY: CLARIFYING ALLOWED EMPLOYEE SEVERANCE

Neither the majority or minority approach to analyzing allowed priority severance under the Bankruptcy Code consistently results in outcomes which best serve the interests of creditors or provide predictable protections for employees.[185] Instead, courts have found it necessary to work around these rules allow debtors to circumvent the Bankruptcy Code's unwieldy restrictions on severance payments.[186] This Part argues for separate treatment of severance pay under the

addition to required notice in advance of payments above certain amounts, the court also required the debtor provide "a summary of amounts paid related to the Non-Insider Severance Program . . . to the U.S. Trustee, advisors to the Term Loan Lender Group . . . , and any statutory committee appointed in these chapter 11 cases every 30 days beginning upon entry of this Order." Id.

[183] See Dietderich, supra note 89, at 29 n.6.

[184] In Purdue Pharma's bankruptcy, the company chose to file in the Southern District. The court noted in its employee motion that "severance payments earned upon termination after the Petition Date, as would be the case under the [Purdue] Severance Plan, are accorded administrative priority." See supra note 68, Purdue Employee Wages Motion, para.52. The issue was still argued, as the U.S. Trustee's office nevertheless objected to the employee severance programs, with presiding Judge Drain interrupting, "If they're not insiders, then the Second Circuit has already spoken on this issue. I don't understand why it's even an issue under . . . *Straus-Duparquet*." Transcript of Oral Argument at 12, 116, In re Purdue Pharma, No. 19-23649-RDD (Bankr. S.D.N.Y. 2018) (No. 325).

[185] See supra section II.B.

[186] See supra section II.C.

Bankruptcy Code, with provisions establishing a default limit on such payments, but also allowing for negotiated departures from these baseline rules.

First, by establishing a default limit specific to severance pay separate from the generally applicable administrative and wage priority provisions, Congress can solve for the awkward applications of the Bankruptcy Code a common type of claim which does not fit neatly into the Code's structure.[187] Such a provision should give priority status to a set percentage of an employee's severance payment due under "a program that is generally applicable to all full-time employees,"[188] but allow payments above this floor when approved by the bankruptcy court. This provision would apply uniformly to employee severance payment made in bankruptcy regardless of if the employee was terminated immediately prior to filing, or during the bankruptcy, to ensure consistent treatment.

Second, by overtly permitting negotiated departures from the default statutory priority amount through a specified process, Congress can bring into the open and establish consistent oversight of what is already occurring, as courts use judicial discretion to allow severance payments above the strict limits under the accrual approach.[189] Codifying a set of required procedures will ensure more predictability and transparency across courts. And clear processes and well-defined baseline entitlements will enable all parties to more effectively advocate for solutions which further both creditor and debtor interests.[190]

A. *Simple Mandatory Protections Providing Clear Baseline Rights*

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[187] See supra Part II.
[188] Echoing language already found in section 503(c)(2)(A). Bankruptcy Code § 503(c)(2)(A) (2018).
[189] See supra section II.C.
[190] Colin F. Camerer and George Loewenstein, Psychological Perspectives on Justice: Theory and Applications 155 (Barbara A. Mellers & Jonathan Baron eds., 1993) (summarizing that inefficient agreements occur because "parties possess incomplete information," and noting "that increasing the amount of information shared by the two parties will increase efficiency").

The minimum protections provided to employees should be based on set percentages of their total severance claim, subject to a cap.[191] This is as opposed to complicated prorata calculations which vary based on how long a person was employed by the company while in bankruptcy.[192] This system provides clarity and simplicity, unlike the disputed prorated accrual calculation based on an employee's length of service. Establishing numerical caps is one area where court interpretations yield imperfect results.[193] Rather than rely on a judicially created doctrine that attempts to provide some protections to employees without saddling the debtor with overly burdensome obligations, the legislature should clarify its judgement regarding the extent of the policy protections afforded by the Bankruptcy Code.[194]

A clear statement regarding what severance amounts are allowed priority status also provides a starting point for employee expectations in negotiations with their debtor-employers. While it many length-of-service severance policies are not binding contractual agreements but rather subject to discretionary change by the employer,[195] when employees do have some bargaining power, an easily discerned minimum entitlement under the Bankruptcy Code provides a better platform for employees to assert their rights.

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[191] This system is analogous to the Code's established limits on lease rejection damages, which cannot exceed the greater of one year of rent, or fifteen percent of the remaining lease term (not to exceed three years). See Bankruptcy Code § 502(b)(6) (2018).

[192] See supra II.A.

[193] E.g., BFP v. Resolution Trust Corp., 511 U.S. 531, 540 (1994) (rejecting a judicially created rule that 70% of fair market value is "reasonably equivalent value" because "such judgements represent policy determinations that the Bankruptcy Code gives us no apparent authority to make").

[194] This question, with regards to employee severance, was most recently put to Congress in the form of a proposed amendment to the Bankruptcy Reform Act was put forth by Senator Harkin, which was intended to increase the accrual period for the employee wage priority in bankruptcy. 151 Cong. Rec. S2308-02 (2005) (statement of senator Tom Harkin). Mr. Harkin notes, "Many courts have ruled that severance pay is earned during the entire time a worker works for a company" and notes that if an employee is "due $5,000 in severance pay" because the employee "worked for the company for 10 years," if "[t]he company goes bankrupt . . . he can only get [priority] for the last 180 days. So, instead of $5,000, he or she only gets $250. That is grossly unfair." Id. The amendment was lost, 48 to 52. 151 Cong. Rec. S2311 (2005).

[195] E.g., Matson v. Alarcon (In re LandAmerica Fin. Grp., Inc.), 651 F.3d 404, 410 (4th Cir. 2011) ("[T]he board implemented the plan and retained the right to amend the plan or eliminate it entirely.").

By setting a specific percentage of an employee's severance claim which will be due as a priority claim, Congress can also affect the substantive rights of employees. Currently, the accrual approach can result in employees receiving as little as 4% of their severance pay as a priority claim.[196] A provision which provides for a greater percentage, such as 20%, capped at a limit as determined reasonable by Congress, will allow a modest expansion to the rights currently provided. These increased protections comport with justifications for Code provisions protecting employee creditors; justifications which emphasize that as opposed to trade creditors, employee creditors are typically unable to diversify their income to account for risk of default, or to meaningfully select against employment at companies with a high probability of future financial distress.[197]

B. *Overtly Allowing Negotiated Departures from the Baseline Entitlement*

In addition to establishing a baseline portion of an employee's severance claim entitled to priority status, Congress should also continue to permit negotiated deviations from statutory minimums—but based on a specific process. For a bankruptcy court to approve plans which allow employees greater amounts of priority severance, the court should have to satisfy predetermined procedures clearly understood by all parties. Setting out the process through which these approvals are granted will bring consistency and transparency to the court approval process, and allow the legislature to ensure that deviations from absolute priority in this context are properly vetted. Such safeguards would help assure disadvantaged creditors agree with the additional amounts provided to employees, as such amounts necessarily decrease the pool of assets available to other unsecured creditors. The bankruptcy judge, however, would retain the

[196] See supra note 9 and accompanying text.
[197] See supra part I.B.2.

ability to refuse to approve deviations from the statutory minimum even if the required procedures are followed, preserving the ability of the bankruptcy judge to react to unique situations.

The process to secure a bankruptcy judges approval of deviations from the statutory minimum priority severance claim should require sign-off from the unsecured creditors committee and the U.S. Trustee, codifying approvals most bankruptcy judges already require.[198] Approval should also require that the severance plans excludes of insiders and recipients of other types of incentive compensation sometimes provided in bankruptcy.[199] These requirements import the existing innovations of bankruptcy courts and establish them as universal standards. While the provision should not hamstring debtors and courts by imposing certain individual or aggregate caps on priority severance amounts, or specific notice requirements regarding what stakeholders need to be informed of allowed payments, it is likely the approval of the unsecured creditors committee and U.S. Trustee will be contingent on some caps and notice requirements—already a common practice for debtors seeking to pay severance amounts above that permitted by the formal statutory analysis. Leaving these provisions open to negotiation by the parties will ensure bespoke standards that best fit the particular needs of the case at hand. And in the event the bankruptcy judge finds the agreed upon caps too generous, under this proposal, the court will still have the ability to deny approval.

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[198] See supra section II.C.

[199] Section 503(c)(2) already places restriction on insider payments to the debtor, which should be carried forward and incorporated in the proposed separate treatment of severance pay. Bankruptcy Code § 502(c)(2). Additionally, a recipient of a Key Employee Retention Program or Key Employee Incentive Program—special bonuses sometimes sought by debtors to incentive key employees during a restructuring, should not be able to reap the benefit of both programs. For more information on such programs, see generally David Farrell, Payday Before Mayday: The Increasing Use of Pre-bankruptcy Executive Retention Bonuses, Thompson Coburn LLP (June 17, 2020), https://www.thompsoncoburn.com/insights/blogs/credit-report/post/2020-06-17/payday-before-mayday-the-increasing-use-of-pre-bankruptcy-executive-retention-bonuses.

The Code already has provisions which function to facilitate consensual adjustment to the priority framework: Section 1129(b)(2) allows a class to consent to a violation of the order of payment otherwise imposed by the priority scheme when determining the distributions to each class of creditors at the end of the case.[200] This addition to the Code was similarly a codification of a judge made rule requiring adherence to absolute priority in making distributions under a final bankruptcy plan.[201] Adding a similarly structured provision to incorporate judge-made procedures for negotiated departures from a creditor's minimum entitlement will facilitate efficient negotiations and outcomes which contribute to successful reorganizations.

IV. CONCLUSION

This Note proposes fashioning a new set of governing principles for a common issue in bankruptcy, currently subject to complex and conflicting rules which often cease to have governing value at all. Creating clear rules regarding an employee's baseline entitlement and the process through which upward departure are negotiated, contributes to more efficient negotiations between debtors, creditors, and employees. This Note is concerned not only with procedural problems, however, but with the substantive rights provided under the Code. While bankruptcy emphasizes and champions equality of distribution, the fate of terminated employees in corporate reorganizations invokes specific policy problems, exacerbated in an economic landscape where labor has very little bargaining power. Such policy concerns, regarding an employee's ability to bear the hardship of debtor default, are at their height when dealing with

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[200] The Code requires that, for a "plan to be fair and equitable" with respect to a class of unsecured claims, "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property" Bankruptcy Code § 1129(b)(2)(b)(ii) (2018).

[201] In re Bonner Mall P'ship, 2 F.3d 899, 906 (9th Cir. 1993) ("Section 1129(b)(2)(B) is a two-part codification of the judge-made absolute priority rule, compliance with which was a prerequisite to any determination that a plan was fair and equitable under the Bankruptcy Act").

severance payments—often providing a safety net during a period of unexpected unemployment. These concerns serve to justify modest increases to the minimum protections for employee severance benefits, currently provided little protection.

Courts have attempted to fit severance pay cleanly into the current provision of the Bankruptcy Code for over fifty years, and yet the doctrine remains disjointed and ineffective. Perhaps it is time Congress sever the treatment of severance pay, and establish coherent system to solve a relatively simple problem: how much of their severance an employee can keep.

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June 8, 2023

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Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to apply for a clerkship in your chambers starting in 2025. I am a graduate of the class of 2023 of Harvard Law School, where I served as the Vice President/Treasurer of the *Harvard Law Review* and a finalist and oralist in the Ames Moot Court Competition. I will be serving as a law clerk to Chief Judge Michael A. Chagares on the U.S. Court of Appeals for the Third Circuit in 2024.

Enclosed are my resume, law school grade sheet, and writing sample. Additionally, you will be separately receiving letters of recommendation from the following individuals:

- Professor I. Glenn Cohen, Harvard Law School, igcohen@law.harvard.edu, (617) 496-2518
- Professor Martha Minow, Harvard Law School, minow@law.harvard.edu, (617) 495-4276
- Professor Noah Feldman, Harvard Law School, nfeldman@law.harvard.edu, (617) 495-9140
- The Honorable Patti B. Saris, United States District Court for the District of Massachusetts, Honorable_Patti_Saris@mad.uscourts.gov, (617) 748-4141

My experiences throughout law school have refined my abilities in legal writing and oral advocacy. I was an oralist in the semifinal and final rounds of the Ames Moot Court Competition, where I wrote multiple briefs with my team and presented oral arguments before panels of federal district and circuit judges. Most recently, as a student prosecutor in the Suffolk County District Attorney's Office, I engaged in motions practice, docket management, and discovery coordination, culminating in a successful trial where I presented direct examinations, cross examinations, and closing arguments.

I also undertook responsibilities involving complex tasks with competing deadlines. I was elected Vice President/Treasurer of Volume 136 of the *Harvard Law Review*, where I provided multiple rounds of substantive feedback to editors to refine their student writing. I was also responsible for designing the *Review*'s annual writing competition to determine future membership, which required intensive legal research and technical editing. And as a research assistant and teaching fellow for Professor Cohen, I collaborated with coworkers and completed several assignments under exacting deadlines.

I would be honored to contribute to the important work of your chambers. I am readily available via phone or email to provide any more information. Thank you for your time and consideration.

Sincerely yours,
Nikolas Paladino

NIKOLAS PALADINO

258 Marlborough Street #1R, Boston, MA 02116 | npaladino@jd23.law.harvard.edu | (201) 968-7670

EDUCATION

Harvard Law School — Cambridge, MA
J.D., *cum laude* — May 2023
Honors: *Harvard Law Review*, Vice President/Treasurer, Volume 136
Ames Moot Court Competition, Oralist & Team Captain:
1L: Best Appellant Brief Award, Section 4B
Semifinals: Best Brief & Best Overall Team Awards
Finals: Boykin C. Wright Memorial Fund Prize
Dean's Scholar Prize:
Legislation & Regulation, Constitutional Law, Poverty Law Workshop, Facts & Lies, First Amendment
Teaching Fellow:
Civil Procedure, Legislation & Regulation, Constitutional Law
Publications: Recent Case, *Tekoh v. County of Los Angeles*, 135 HARV. L. REV. 1496 (2022)
The Supreme Court, 2021 Term — Leading Cases, 136 HARV. L. REV. 340 (2022)
Note, *The Contract Clause: Reawakened in the Age of COVID-19*, 136 HARV. L. REV. (forthcoming June 2023)
Federalism's Fault Lines in a Presidential Prosecution, HARV. L. REV. BLOG (forthcoming June 2023)

Harvard College — Cambridge, MA
B.A., *magna cum laude* in Economics, Secondary in English — May 2020
Honors: Phi Beta Kappa, Alpha Iota Chapter of Massachusetts; John Harvard Scholar (awarded to top 5% of the class)
Activities: President of the Harvard Glee Club; Research Assistant to Benjamin M. Friedman, Professor of Economics

EXPERIENCE

The Honorable Michael A. Chagares, Chief Judge of the U.S. Court of Appeals for the Third Circuit — Newark, NJ
Law Clerk — August 2024 – August 2025

Suffolk County District Attorney's Office — Boston, MA
Rule 3:03 Student Prosecutor — September 2022 – January 2023
Represented the Commonwealth of Massachusetts in criminal matters, including motions to suppress, bail hearings, and trials. Direct- and cross-examined witnesses at trial. Managed more than forty cases in the West Roxbury District Court.

Harvard Law Review — Cambridge, MA
Vice President/Treasurer — January 2022 – January 2023
Edited student writing, managed an operational budget of over $100,000, supervised three full-time staff members, served as a voting member of the Board of Trustees, and designed the *Review*'s annual Writing Competition to determine membership.

Ropes & Gray LLP — Boston, MA
Summer Associate — May 2022 – August 2022
Prepared research and strategy memoranda regarding various litigation matters, such as a motion to quash subpoena duces tecum on Free Exercise grounds, SEC enforcement history, and OIG settlements involving corporate monitors.

Office of U.S. Senator Sheldon Whitehouse — Washington, DC
Researcher & Copyeditor — December 2021 – October 2022
Proofread and factchecked manuscripts of Senator Whitehouse's book, *The Scheme*, on corporate capture of the judiciary.

U.S. Attorney's Office for the District of Massachusetts, Criminal Division — Boston, MA
Legal Intern – Securities, Financial, & Cyber Fraud Unit — May 2021 – August 2021
Drafted motions in limine addressing criminal subpoenas and due process claims. Researched pretrial topics on Fourth Amendment excessive force jurisprudence, self-authentication, hearsay exceptions, and seized electronic property.

Professor I. Glenn Cohen, Harvard Law School — Cambridge, MA
Research Assistant — January 2021 – Present
Provide substantive feedback and technical edits for upcoming legal publications on health law and bioethics.

Legal Services Center of Harvard Law School — Jamaica Plain, MA
Student Advocate — May 2019 – August 2020; Fall 2021
Advocated for over twenty clients in appealing the rejection of government benefits, providing bilingual consultation. Codeveloped the CORI Sealing Initiative to provide criminal record sealing to low-income populations.

SKILLS AND INTERESTS

Intermediate Spanish proficiency. Interests include tennis, the New Jersey Devils, Shakespeare, and choral singing.

Harvard Law School

Date of Issue: May 26, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Nikolas Paladino
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023 Cum Laude
Boykin C. Wright Memorial Fund Prize
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 4 Cohen, I. Glenn	H	4
1001	Contracts 4 Bar-Gill, Oren	P	4
1006	First Year Legal Research and Writing 4B Zubrzycki, Carly	P	2
1003	Legislation and Regulation 4 Freeman, Jody * Dean's Scholar Prize	H*	4
1005	Torts 4 Goldberg, John	H	4
	Fall 2020 Total Credits:		18

Winter 2021 Term: January 01 - January 22

1055	Introduction to Trial Advocacy Sullivan, Ronald	CR	2
	Winter 2021 Total Credits:		2

Spring 2021 Term: January 25 - May 14

2015	Business Strategy for Lawyers Spier, Kathryn	H	3
1024	Constitutional Law 4 Eidelson, Benjamin * Dean's Scholar Prize	H*	4
1002	Criminal Law 4 Gersen, Jeannie Suk	P	4
1006	First Year Legal Research and Writing 4B Zubrzycki, Carly	H	2
1004	Property 4 Benkler, Yochai	P	4
	Spring 2021 Total Credits:		17
	Total 2020-2021 Credits:		37

Fall 2021 Term: September 01 - December 03

2000	Administrative Law Freeman, Jody	P	4
7000W	Independent Writing Minow, Martha	H	2
3119	Poverty Law Workshop: A Toolkit for Addressing Inequity & Homelessness McCormack, Julie * Dean's Scholar Prize	H*	2
8039	Veterans Law and Disability Benefits Clinic Gwin, Elizabeth	H	3
	Fall 2021 Total Credits:		11

Winter 2022 Term: January 04 - January 21

2249	Trial Advocacy Workshop Murray, Peter	CR	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

2050	Criminal Procedure: Investigations Natapoff, Alexandra	P	4
2079	Evidence Lvovsky, Anna	H	4
2861	Facts and Lies Saris, Patti * Dean's Scholar Prize	H*	2
2949	Presidential Power in an Era of Conflict Eggleston, W. Neil	H	2
	Spring 2022 Total Credits:		12
	Total 2021-2022 Credits:		26

Fall 2022 Term: September 01 - December 31

2035	Constitutional Law: First Amendment Feldman, Noah * Dean's Scholar Prize	H*	4
2156	Non-profit Organizations and Law Minow, Martha	H	2
3014	Supreme Court and Appellate Advocacy Workshop Halligan, Caitlin	H	2
	Fall 2022 Total Credits:		8

Fall-Winter 2022 Term: September 01 - January 31

8003	Criminal Prosecution Clinic Corrigan, John	H	5
2328	Criminal Prosecution Clinical Seminar Corrigan, John	H	3

continued on next page

Assistant Dean and Registrar

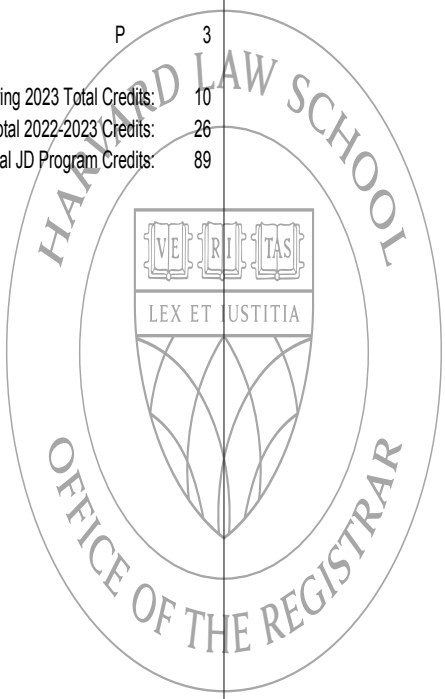
Harvard Law School

Record of: Nikolas Paladino

Date of Issue: May 26, 2023
Not valid unless signed and sealed

	Fall-Winter 2022 Total Credits:		8
	Spring 2023 Term: February 01 - May 31		
3042	Classical Liberalism and the Rule of Law Kethledge, Raymond M.	H	2
2086	Federal Courts and the Federal System Fallon, Richard	H	5
2958	The International Law of the Sea Kraska, James	P	3
	Spring 2023 Total Credits:		10
	Total 2022-2023 Credits:		26
	Total JD Program Credits:		89

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 09, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to you to give Nikolas ("Niko") Paladino, a graduate of the class of 2023 at Harvard Law School and the Vice President/Treasurer of Volume 136 of the Harvard Law Review, my very highest recommendation for a clerkship in your chambers. Niko was a student in my Civil Procedure course last year. I thought so highly of his work in this setting that I hired him both as a Teaching Fellow for the course and as a research assistant for some of my scholarly writing, roles in which he has also very much impressed me. Because I have observed him in these myriad contexts, worked with him closely, and seen a considerable amount of his work product, I can confidently tell you that he would make an excellent clerk for your chambers.

First, let me say a word about Niko's performance in Civil Procedure. It is a fairly large class (roughly 80 students) in the first semester of the first year, and it is a testament to the kind of outstanding student Niko is that even in our 80-person first year course, Niko's great abilities stood out. At Harvard we have made (in my mind) the unfortunate curricular decision to do the entirety of Civil Procedure in four credit hours in one semester, which means that my course operates at an extremely swift pace with a very intense workload. Notwithstanding the rigorous demands, Niko was always at the top of his game. He was one of the students I called on during our "mock class" at orientation, on the topic of the permissibility of John Doe plaintiffs. In the course of that hour, which I run in a more free flowing way then the eventual civil procedure classes, I wait for someone to offer the clever reading of FRCP 10(a) (which states in relevant part that the "complaint must name all parties") that "John Doe" is a party name, only to show why the implications of that reading might be too-clever-by-half (i.e., that it would permit pseudonymity in every case). To my delight, Niko was the first in class to volunteer with the "move" but then quickly see what was problematic about it (the "counter-move" as it were). This was during orientation no less! As the semester went on, I could easily rely on Niko whenever I had something on the more difficult side of the course, such that when I had to pick a student to call on for what I view as the most difficult case I teach in the whole semester, the Supreme Court's personal jurisdiction decision of J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011), I called on him. He masterfully took the students through the three primary opinions in the course and helped us to try to make sense of them – no easy feat given how inscrutable parts of the opinions can be. It was thus no surprise he did very well in Civil Procedure on the final exam, earning an honors grade and just missing the Dean's Scholar award by a hair.

I was so impressed by the work he did in class and also the way he helped and supported his classmates who struggled with the class that I asked him to serve as one of my six teaching fellows for the course this past year. I ask these students to "channel me" in helping give the 1Ls feedback (guided with my own grading rubric) on mock exams and exercises throughout the semester, to organize teaching sessions on particularly difficult topics, and to serve a pastoral role in advising the (always anxious and intense) first year students. Unsurprisingly, by all accounts Niko excelled in this work. Indeed, two of my colleagues came to the same conclusion, asking him to serve as a teaching fellow in their legislation and regulation and constitutional law courses respectively. To put it colloquially, Niko is very much a "fan favorite" of the faculty who have taught him. I think all of this augurs well for how well he will do in your chambers – in particular his ability to "channel" your voice in written materials, take feedback, and work in a team environment.

As a research assistant, Niko's attention to detail, excellent writing skills, and intellectual horsepower were also outstanding, as demonstrated by various projects I assigned to him. He took his own experience with the Civil Procedure course and helped me to update course my materials. Perhaps even more simulative of the work you might ask of him in chambers, I asked him to edit and improve an early draft of a paper I had recently written looking at genetic testing, inequality, and American politics. I asked him to read the primary source material I was covering himself to "look over my shoulder" on the content in addition to the citation checking and line editing parts of the editing process. The content of the paper not only covered an area where he had little or no background (genetic testing), but also mixed economics, political science, psychology, race and the law, and disability. To make matters worse, I asked Niko to complete his review and edits on a very compressed schedule. The work I got back from him was nothing short of outstanding, showing not only creativity and attention to detail but that rarest gift in the law of judgment, which is much harder to teach. From the work product I have seen from him, I am confident he will start far ahead of the curve on much of what you might ask him to do in chambers (bench memos, opinion drafts, etc.).

Personality-wise Niko is delightful. He is funny, self-deprecating, and truly beloved by his classmates. He knows how to roll up his sleeves and work hard but also how to work well in a team – as evidenced by his work in the upper year Ames moot court competition (his team has advanced to the finals which will be held next academic year) and being in one of the four major positions on the Harvard Law Review. He loves English literature singing and is proudly still involved with the Harvard glee club. If I had to be stuck in an elevator for hours on end with one of my 1L students, he would easily be high on my list and I think he will quickly become one of your favorites in chambers.

This is a young man who has much to give to the world and I hope that under your mentorship he can begin doing so. My own clerkship was instrumental to my career, not only in terms of the mentorship and the improvement of my writing I received from my judge, but in building a life-long friendship that has followed me to every job I have pursued after law school. I think it is reasonable, then, for a judge to ask what this applicant will look like five or ten years from now if he gets a spot in your chambers.

I. Glenn Cohen - igcohen@law.harvard.edu - 617-496-2518

I think with Niko the possibilities are quite exciting. Given his intellectual interests I can easily see him alternating between a leading white collar criminal law private sector practice and stints in the U.S. Attorney's office or parts of Main Justice. I cannot tell you exactly where his career will take him, but I am confident that when he returns for his tenth-year reunion it will be a career of which he, and less importantly I, will be very proud.

In sum, as someone who clerked myself and then spent time as a litigator while at the Justice Department, I have a sense of the kind of person a judge can rely on as an outstanding clerk. I think Niko would make an excellent clerk for your chambers and give him my highest recommendation. I would be happy to answer any more questions you might have about him.

Sincerely Yours,

I. Glenn Cohen
Deputy Dean and James A. Attwood and Leslie Williams Professor of Law, Harvard Law School
Faculty Director, Petrie-Flom Center for Health Law Policy, Biotechnology & Bioethics

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to highly recommend Niko Paladino for a clerkship. He is an excellent writer and made extremely insightful comments in my class at Harvard Law School. Niko received a Dean's Scholar Prize.

As mentioned, Niko was a student in my seminar, Facts and Lies, spring 2022 at Harvard Law School. We met twelve times in a small group, and Niko also spoke with me several times in office hours. The course focused primarily on the role of the trial court in finding facts, the tools used to assess credibility, problems with memory and implicit bias, and the doctrines which punish lying. We also addressed appellate review of agency factfinding and the standards of appellate review of factual questions, in particular in constitutional areas and mixed questions of fact and law. We talked about the role of the "managerial" trial judge.

I required extensive writing. Each student drafted a memorandum in support of a motion to dismiss, in opposition, and a memorandum on a summary judgment motion. Students also submitted response papers to the readings.

Niko's written product was excellent. His final memorandum was one of the best in the class. He drafted a memorandum on a motion for summary judgment in a civil rights action involving the qualified immunity doctrine. The factual narrative was excellent; he used the extensive record well. His legal analysis was also outstanding. Niko is extremely articulate and helped make the class discussions lively.

I have no reservations about recommending Niko. He is a great guy and will make a terrific clerk. Please call if there are any questions.

Very truly yours,

Patti B. Saris
U.S. District Judge

Patti Saris - Honorable_Patti_Saris@mad.uscourts.gov

June 06, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is a genuine pleasure to recommend Nikolas (Niko) Paladino as he applies to work as your law clerk. From his work as a research assistant, as a student in a course, and as an adviser on an independent writing project, I have worked extensively with Niko and commend his analytic powers and devotion to intensive, collaborative work.

Niko researched and wrote a paper under my supervision; it addresses the Contract Clause of the Constitution and its implications for a jurisprudential return to the Lochner era. The paper topic was born out entirely from his own initiative and reflects his curiosity about judicial latitude in enforcing a laissez-faire perspective on economic policies. As his thoughtful paper examines, assumptions that the Contract Clause is seemingly a “dead letter” deserve a closer look. As he demonstrated, the Contract Clause was the strongest muscle of the early Supreme Court in striking down state legislation, and it could be revived just as the non-delegation doctrine has reappeared despite being declared defunct by scholars. Niko’s research was thorough, and his first draft was strong. He has a knack for historical storytelling with an analytic bend. Part I of that paper covered the early Supreme Court’s treatment of the Contract Clause based on sparse text and little recorded discussion during the Framing; Part II introduced parallels between Contract Clause jurisprudence and the Lochner-era notion of economic due process. Part III explained why all that history mattered and noted how the COVID-19 pandemic introduced opportunities for the Contract Clause to be revived; the paper ends with interpretive and historical theories offering responses to those possibilities. I suggested that he consider tying his analysis to debates over natural rights; he did so well in the revision. He responded thoroughly and promptly to feedback, and readily earned an honors grade. He also developed a practical procedural argument for using Section 1983 to imitate suits to enforce the Contract Clause. The resulting paper will soon be published as a Note in the Harvard Law Review.

I can easily see his contributions to your chambers reflecting similar intensive research, discussion, drafting, and revision. He has great abilities to distill long lines of precedents into succinct explanations and to apply them to the cases. I especially appreciate his intellectual honesty and his clear and unpretentious writing style.

I also remember well when Niko asked a memorable question when I gave a guest presentation at the Poverty Law Workshop. I presented to the students and faculty data and analysis about the lack of access to civil justice, a pervasive issue especially in the midst of the COVID-19 pandemic. Niko asked about the potential for “automated adjudicators”—essentially machine learning programs—to partially remedy this gap. I responded that such efforts have promise especially in terms of efficiency, but due process concerns especially about giving litigants the experience of feeling heard could develop. Niko later told me that the effort to balance efficiency and fairness remains with him as a lesson from the course, where he received a Dean’s Scholar Prize (one of the very top grades).

I was delighted then to see that he enrolled in my class on Nonprofit Organizations and the Law. There he was a valuable contributor, and drew on his survive on the boards of two nonprofit organizations: the Harvard Law Review Association (in his capacity as Vice President/Treasurer) and the Harvard Glee Club Alumni, as well as on his work also because I had the opportunity to work with nonprofit clients during his summer job. He wrote two very good papers and received an Honors grade in the class.

Our first interaction arose when he asked if he could serve as my research assistant. I had already filled the post, but connected him with Jennifer Mueller, who was working with Senator Sheldon Whitehouse on a book project. Niko soon became an indispensable member of the team, working with Ms. Mueller on fact-checking and editing the Senator’s writing. He even volunteered to work double-time in that project because of another editor’s family emergency. I have heard back from the team that they are very impressed with and grateful to Niko.

He competed as an oralist in the final round of the Ames Moot Court Competition, presided by Chief Judge Sri Srinivasan of the D.C. Circuit, Judge Britt Grant of the Eleventh Circuit, and Judge Rowan Wilson of the New York Court of Appeals. It was an intense and meaningful immersion in brief writing and advocacy at a very high level.

In addition, he had the opportunity to serve as a Rule 3:03–certified student prosecutor for the Suffolk County District Attorney’s Office through HLS’s Criminal Prosecution Clinic. Through that work, he represented the Commonwealth of Massachusetts in the West Roxbury District Court, arguing bail, suppression, and dispositive motions; he also argued a bench trial, where he conducted direct examinations, and cross examinations, and introduced evidentiary motions.

Niko has sought out excellent work experiences outside of law school. For example, he worked as a summer associate at Ropes

Martha Minow - minow@law.harvard.edu - 617-495-4276

& Gray in the firm's Boston headquarters, working on general litigation matters ranging from First Amendment issues to corporate monitorship requirements. He received an offer from Chief Judge Michael A. Chagares of the U.S. Court of Appeals for the Third Circuit to clerk in his chambers starting in 2024. He hopes very much to work with you as he is fascinated by the trial process.

This is a hugely talented person who truly also works hard. When I asked what he has valued most during law school, he pointed to the cooperative aspects of the activities that he has sought out. From his work as Vice President/Treasurer—one of the "Big 4" roles on the Law Review — requires coordination with the President, the Vice President/Coordination, Diversity, and Outreach, and the Managing Editor to produce each issue. The moot court finalist teams similarly engage thoroughly with one another to produce the briefs, prepare for argument, and engage in the public event. Niko has enriched his classmates and our law school community with his talent, drive, and devotion to working with others. I know he would bring those great qualities to your chambers and I am delighted to give my strong recommendation.

Sincerely,

Martha Minow
300th Anniversary University Professor
Harvard Law School

June 05, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Nikolas Paladino for clerkship in your chambers. I first met Nicholas when he was a student in my First Amendment class in the Fall of 2022. In class he was thoughtful and productive, keeping his comments concise and demonstrating a strong command of the material. On the exam, he positively shone, earning a Dean's Scholar prize, our equivalent of an A+.

Nikolas's record is that of an extremely strong Harvard Law School student, the kind who turns into a highly successful law clerk. He has published three separate pieces in the Harvard Law Review, the maximum any student can – itself no small feat. He's been an Ames moot court finalist. And, he is poised for a clerkship with Judge Chagares on the U.S. Court of Appeals for the Third Circuit.

I got to know Nikolas's writing and intellectual style very well when acting as the faculty supervisor for his terrific law review essay on Shurtleff v. City of Boston, the flagpole case that was Justice Breyer's last majority opinion on the Supreme Court. Nikolas cut through the doctrinal structure of the decision, arguing for the "unrealistic rigidity of the government-speech test." He made the compelling points that the court's formalism will probably lead to less speech, not more. And, Nikolas sensibly recommended intermediate scrutiny for cases of mixed government-private speech. The piece showed a laudable understanding of the history of First Amendment thinking, combined with a commonsense assessment of institutional realities facing government decision-makers.

Throughout the process, Nikolas took my feedback thoughtfully and sensibly. His own vision was strikingly clear from the beginning, but it was more than willing to engage questions, comments, criticisms. Overall, he demonstrated the intellectual acuity and flexibility necessary to be a very strong clerk. I am very pleased to recommend him.

Yours sincerely,
Noah Feldman
Felix Frankfurter Professor of Law
Harvard Law School
Cambridge, MA 02138

Noah Feldman - nfeldman@law.harvard.edu - 617-495-9140

NIKOLAS PALADINO
258 Marlborough Street #1R, Boston, MA 02116 | npaladino@jd23.law.harvard.edu | (201) 968-7670

WRITING SAMPLE

Attached is an excerpt of the brief that my team submitted in the Ames Moot Court Competition semifinals round in March of 2022. Apart from discussion with my teammates, the excerpt reflects solely my own writing. A sporting goods store, Harkness, issued a receipt to the plaintiff, Mary Chen, that displayed her full credit card number, in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). I argue below that violating FACTA's truncation requirements does not alone qualify as an injury in fact for Article III standing.

III. CHEN'S SUIT FOR STATUTORY DAMAGES SHOULD BE DISMISSED BECAUSE SHE HAS NOT SUFFERED AN INJURY IN FACT.

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court confirmed that a statutory violation is only the starting point for determining whether an injury in fact is concrete for suits seeking statutory damages. *See id.* at 2205.[1] Thus, even if Harkness violated FACTA, this Court must still independently determine whether Chen suffered a concrete injury. To satisfy the concreteness requirement, Harkness's conduct must have caused tangible or intangible harm to the plaintiff. *Ewing v. MED-1 Sols., LLC*, 24 F.4th 1146, 1151 (7th Cir. 2022).

A tangible harm often includes straightforward physical or monetary injury and "readily qualif[ies] as [a] concrete injury." *TransUnion*, 141 S. Ct. at 2204. An intangible harm — like a statutory violation absent physical or monetary harm — is concrete in a suit seeking damages when the alleged harm has traditionally formed "a basis for a lawsuit in American courts." *Id.* at 2197. But receiving a FACTA non-compliant receipt is neither. Instead, it represents only a risk of future harm, which does not grant standing to sue in federal court for damages. *Id.* at 2208–13. Nor does the speculative risk cause an intangible harm, as it is incomparable to any tort recognized at common law. Chen has not experienced concrete harm and thus has no standing. *See id.* at 2200 ("No concrete harm, no standing.").

A. Harkness's alleged truncation violation does not have a sufficiently close relationship to a common law cause of action to be a concrete harm.

Though Chen cannot base her claim on a risk of harm, she may show a concrete harm by asserting that Harkness's conduct bears a "close relationship" to a harm "traditionally recognized

[1] An Article III injury in fact requires both concreteness and particularity. The parties agree that Chen pleads a particularized "injury." *See* Appellants' Br. 41.

as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2200 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). What is considered "traditionally recognized" has never been squarely interpreted, though courts generally require a common law analogue. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020); *Ewing*, 24 F.4th at 1153 ("[W]e must look for a common law analogue to ensure a concrete harm."). Indeed, "the model of the traditional common-law cause of action" is regarded as "the conceptual core of the case-or-controversy requirement." *Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring). Though an "exact duplicate" to a common law cause of action is not required for standing, Chen must identify an analogue that is sufficiently close to the harm of receiving a receipt with one's own credit card number on it. *TransUnion*, 141 S. Ct. at 2204. Chen's theory fails on this score.

Whether the alleged wrong has a sufficiently close analogue actionable at common law is a matter of kind, not degree. The elements of the purported harm — in this case, the truncation violation — must share the elements of a common law analogue, rather than cause a certain level of harm. *See Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1192 (10th Cir. 2021) ("Without the 'necessary' defamation component that the tortious words were published, [the] harm differed in kind."); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462–63 (7th Cir. 2020). Importantly, the common law inquiry "is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts," *TransUnion*, 141 S. Ct. at 2204, and thus must remain moored to the essential elements of these analogues.

Chen raises breach of confidence, nuisance, and copyright infringement as potential analogues to establish standing. Appellants' Br. 29–30. None is adequate, and concreteness cannot be found on any of these grounds.

1. *Breach of confidence, a tort unmoored from American history and tradition, requires confidentiality and actual disclosure to a third party, neither of which is satisfied here.*

Chen first analogizes to the tort of breach of confidence to establish standing. *See* Appellants' Br. 30. But breach of confidence's place in the American common law tradition is questionable. Far from having established common law roots, breach of confidence "[died] out in its infancy" and is "a relative newcomer to the tort family" in the American common law tradition. *Muransky*, 979 F.3d at 931 (quoting Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1451–54 (1982)). Because the *TransUnion* inquiry is directed at finding a common law analogue, breach of confidence's lack of American roots renders it barren ground from which to raise a tort analogy.

Even if breach of confidence were firmly rooted in American common law, Chen's claim omits two necessary elements — indeed, the *only* elements — of a successful claim. First, the tort requires a confidential relationship between the parties. Confidential parties recognized in successful actions include intimate *professional* relationships, like those between doctors and patients, *Horne v. Patton*, 287 So.2d 824, 831–32 (Ala. 1973), and banks and patrons, *Suburban Tr. Co. v. Waller*, 408 A.2d 758, 762 (Md. Ct. Spec. App. 1979). Unlike doctors and banks, cashiers do not have professional, confidential relationships with a store's customers. *See Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 641 (6th Cir. 2021). They only briefly process credit card information to complete a customer's transaction, a role which does not involve the repeated

handling of a client's confidential information. Nor does the policy underlying breach of confidence suggest that a receipt handoff has a sufficiently "close relationship" to the tort. Breach of confidence "is rooted in the concept that the law should recognize some relationships as confidential to encourage uninhibited discussions between the parties involved." *Young v. U.S. Dep't of Just.*, 882 F.2d 633, 640 (2d Cir. 1989). But retail stores have no need for "uninhibited discussions" with their customers. *See Muransky*, 979 F.3d at 932 ("Handing a common form of payment to a cashier at a retail store is simply not equivalent to these kinds of vulnerable, confidential relationships."). Chen never established a confidential agreement with Chen, precluding an analogy to breach of confidence.

Beyond failing to show a confidential relationship existed, Chen does not establish that such "confidence" was in fact breached. Breach only "transpires when a third party gains unauthorized access to a plaintiff's personal information." *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 114 (3d Cir. 2019). But when a Harkness Sporting Goods cashier hands a receipt to a customer like Chen, no third party is involved, nor does Chen allege otherwise. *See Muransky*, 979 F.3d at 932 ("To describe [receipt of a receipt] as a 'disclosure' would distort the meaning of the term."). Chen only alleges that the possibility of third-party access to her credit card number has increased, citing *Cothron v. White Castle Systems, Inc.,* 20 F.4th 1156, 1161 (7th Cir. 2021), a case related to biometric data disclosure. *See* Appellants' Br. 31. But *Cothron* analogized to privacy torts,[2] rather than breach of confidence, and involved not a risk of disclosure, but actual

[2] Even if argued, a privacy tort analogy would lend no help to Chen's lawsuit. Harkness did not intrude upon Chen's private credit card information — in fact, *all* putative class members must have consented to supplying such information to complete their transactions. Courts have accordingly recognized that truncation violations "lack[] a sufficient nexus to traditional privacy rights." *Taylor v. Fred's Inc.*, 285 F. Supp. 3d 1247, 1261 (N.D. Ala. 2018); *see, e.g.*, *Kamal*, 918 F.3d at 114; *Muransky*, 979 F.3d at 932; *Thomas*, 997 F.3d at 641; *Bassett v. ABM Parking Servs.*, 883 F.3d 776, 781 (9th Cir. 2018).

disclosure. *See Cothron*, 20 F.4th at 1161. Establishing that there is liability for breach of confidence when the risk of disclosure increases, rather than when the disclosure actually occurs, would change the common law harm in kind, not just degree. Moreover, as the Supreme Court concluded, "an asserted risk of future harm is unavailing" in suits requesting statutory damages. *TransUnion*, 141 S. Ct. at 2211. Chen's proposed injury is exactly that: a remote risk of a breach that remains unrealized. Her breach of confidence claim thus lacks both breach *and* confidence and cannot satisfy Article III's concreteness requirement.

. . .

3. *Copyright protects against intellectual property infringements, not harms from excess credit card digits printed on receipts.*

Chen lastly relies on an analogy to copyright infringement. It too is insufficient. Chen bases her common law analogy on two grounds: first, that copyright infringement has a common law basis, and second, that actions based on the risk of future harm were actionable at common law and so should be actionable here. *See* Appellants' Br. 35–36. However, copyright has no common law basis. And even if copyright infringement had a sufficient common law pedigree, Chen's characterization of it as a tort based "on the risk of future harm" is in direct tension with *TransUnion*. Notwithstanding flaws related to history and foreclosure by the Supreme Court, copyright infringement does not have a "close relationship" to a truncation violation.

Unlike traditional tort actions, copyright infringement has no common law basis. For over 180 years, the Supreme Court has declared that copyright "does not exist at common law," *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834), and is only "a creature of statute," *Stewart v. Abend*, 495 U.S. 207, 251 (1990). The only common law forms of copyright exist at state law for pre-publication works but even then are largely preempted by the Copyright Act. *See Russell v.*

Price, 612 F.3d 1123, 1129 n.17 (9th Cir. 1979). Copyright is not a "creature" of common law and therefore provides little recourse to a common law–based analogy in support of standing. Indeed, Chen does not recognize a single court that has found a FACTA violation alone to be a concrete harm on the basis of a copyright analogy.

Even if copyright infringement were recognizable as an analogue, neither its essential elements nor its purpose resembles FACTA's truncation requirement. Two elements are required to establish copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Receipts are not copyrightable, and Chen thus has no intellectual property to protect. *See* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship . . . ."). The *only* similarity between copyright infringement and truncation violations is the future risk of economic harm, but future harm cannot suffice for standing. If it could, *TransUnion* would not have held that "the mere risk of future harm, without more, [does not] demonstrate Article III standing in a suit for damages." *TransUnion*, 141 S. Ct at 2211. Thus, this tort analysis fails and so too does Chen's claim of concreteness.

* * *

Chen cites reports documenting nearly 400,000 cases of credit card fraud in the United States. Appellants' Br. 44. What matters here, however, is that Chen is not one of them. Because truncation violations and speculative receipt-shredding involve no tangible or intangible injury to Chen, she cannot show a concrete harm for standing.

B. Refusal to treat a bare statutory violation as concrete in a suit seeking statutory damages preserves the separation of powers.

By refusing to "treat an injury as 'concrete' for Article III purposes based only on Congress's say-so," *Trichell v. Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020), federal courts preserve the proper separation of powers. If all statutory violations could support a suit seeking damages, all three branches could exceed their constitutional bounds. Under Chen's theory of standing, "Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law." *TransUnion*, 141 S. Ct. at 2206. The Executive branch's Article II authority would shift to democratically unaccountable private plaintiffs, who could hijack the Executive's "choice of how to prioritize and how aggressively to pursue legal actions." *Id.* at 2207. Federal courts would be forced to award damages to unharmed plaintiffs, eliminating the judiciary's Article III limitations. This deputization would overwhelm federal courts, rendering their role in the separation of powers as nothing more than illusory. *See id.* at 2203. A solely statutory analysis of standing thus risks toppling the balance of power between the three branches of government.

This concreteness limitation does not nullify Congress's power. Congress's judgment is entitled to "due respect" in a standing inquiry, so it "may 'elevate' harms that 'exist' in the real world," but "it may not simply enact an injury into existence." *Id.* at 2204–05 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)). For instance, in *Gadelhak*, then-Judge Barrett recognized that a few unwanted text messages would lack concreteness at common law, but the TCPA made such annoyances a concrete harm because it was the same *kind* of harm as the common law tort of intrusion upon seclusion. *Gadelhak*, 950 F.3d at 463. *Gadelhak* shows Congress's power to shape standing while imposing limits that guarantee Congress cannot meddle

in the affairs of other branches. Moreover, the Constitution endows Congress with the power to establish damages for constitutional harms, ranging from copyright, *see* U.S. Const. art. I, § 8, cl. 8 (describing Congress's enumerated power to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"), to First Amendment violations, *see TransUnion*, 141 S. Ct. at 2204.

The concreteness requirement protects the role of both the judiciary and the legislature in the federal system. It guarantees that legal questions will be resolved in "a concrete factual context" rather than in the "rarified atmosphere of a debating society." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). *TransUnion*'s holding ensures that federal courts remain arbiters of true cases and controversies, not auditors of abstract procedural disputes that fail to establish legitimate, concrete injuries. *See Chi. & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (emphasizing that judicial power is legitimate only "as a necessity in the determination of real, earnest, and vital controversy"). "Far from an assault on the other branches," standing doctrine "is an insistence that they are supreme within their respective spheres, protected from intrusion — however welcome or invited — of the judiciary." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1226 (1993). This Court should heed the words of the Chief Justice and the holding of *TransUnion* to affirm the judgment of the district court: that a mere truncation violation is insufficient for standing.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the district court's judgment.

Applicant Details

First Name	**Christopher**
Last Name	**Pearsall**
Citizenship Status	**U. S. Citizen**
Email Address	**chrispearsall87@gmail.com**
Address	**Address** **Street** **2891 Clark Avenue** **City** **Oceanside** **State/Territory** **New York** **Zip** **11572** **Country** **United States**
Contact Phone Number	**516-236-6575**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2009**
JD/LLB From	**Hofstra University School of Law** **http://law.hofstra.edu/home/index.html**
Date of JD/LLB	**May 16, 2015**
Class Rank	**30%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate**

Recommenders

Greenberg, William
wgreenberg@uscourts.cavc.gov
(201) 501-5970
Ottenheimer, Eric
eottenheimer@uscourts.cavc.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher Michael Pearsall, Esq.
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Oceanside, NY 11572
chrispearsall87@gmail.com / (516) 236-6575

April 30, 2023

Judge Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Camden Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto,

I am submitting this cover letter and attached resume as part of my formal application for a position as a judicial law clerk with your chambers.

Clerking for the Eastern District of New York represents the culmination of many years of hard work and determination, and an opportunity to continue to explore my passion for the law and helping others.

While serving as a law clerk for Judge William S. Greenberg of the United States Court of Appeals for Veterans Claims, I have been afforded the opportunity to not only further develop my legal research, writing, and analysis skills, but also to give back and serve a most deserving class of individuals. Having personally contributed to over 200 single judge dispositions, 10 panel decisions, and two *en banc* matters, I have navigated the deepest depths of a challenging regulatory scheme and tackled the complexities of crafting solutions to novel legal issues. I learned about the challenges of balancing competing interests, including, empathizing with each veterans' individual circumstances, applying the law equitably, and giving deference to the ultimate decision maker. More specifically, I learned that the fairest decision is not always the easiest decision to draft and justify.

Similarly, while working in private practice, I represented musicians and authors; advocating for them as they sought to protect their life's work. Witnessing clients' ideas and art be copied and stolen exposed me to a different, but equally intricate, area of law that presented a unique set of issues. Fighting copyright infringement required me to develop legal solutions that were just as creative as the works in dispute. I was able to take my clients' passion for creating and channel that energy into my legal career.

These experiences have allowed me to grow as a person and ultimately into the attorney that I am today. I am eager to continue serve those in need and I am excited at the opportunity to study the law under Your Honor's direction.

Thank you for your time and consideration.

Sincerely,
Christopher Pearsall

Christopher Michael Pearsall, Esq.

2891 Clark Avenue, Oceanside, NY 11572 • chrispearsall87@gmail.com • 516-236-6575

PROFESSIONAL EXPERIENCE

United States Court of Appeals for Veterans Claims, Washington, D.C.
Judicial Law Clerk to the Honorable Judge William S. Greenberg August 2020 - Present

- Responsible for all aspects of case management and docket administration.
- Research and draft opinions in numerous areas of veterans law, recommending a final disposition for each appeal.
- Assist Judge Greenberg in preparation for and conducting of oral arguments and panel matters.

Abrams Fensterman, LLP, Brooklyn, NY
Litigation Associate April 2018 – July 2020

- Responsible for motion and appellate practice; court appearances, including oral argument of dispositive motions; conducting and defending depositions; settlement negotiation; and discovery/e-discovery.
- Granted an arbitration award after a hearing, defeating claims of serious bodily injury and loss of income.
- Awarded summary judgment on liability for a livery cab company against all defendants in a multi-car accident.
- Awarded summary judgment for a skilled nursing facility seeking payment against a former resident and multiple co-defendants, and defeated counterclaims for neglect and failure to mitigate damages.
- Negotiated a settlement and mutual release between a skilled nursing facility and a former resident, resolving issues of services rendered, neglect, and failure to supervise.

Sunshine & Feinstein, LLP, Garden City, NY
Litigation Associate May 2016 – April 2018

- Successfully drafted and prosecuted an appeal, while defeating a cross-appeal; winning choice of law questions and restoring breach of contract and defamation claims.
- Negotiated a partnership buyout and dissolution of a merchant services company valued at $5 million.
- Assisted in settling equitable distribution of a matrimonial action with assets valued at approximately $40m.
- Successfully defeated a motion for summary judgment by a construction general contractor seeking indemnification from a sub-contractor.
- Successfully defeated a motion for summary judgment filed by a former client in a counsel fee dispute.

CSEA Local 882, Atlantic Beach, New York
Consultant, *Collective Bargaining* September 2014 – June 2021

- Assist local shop leader in negotiating terms of collective bargaining agreement.
- Negotiated a 4-year collective bargaining agreement resulting in annual wage increases of 4%.
- Negotiated a 3-year collective bargaining agreement resulting in annual wage increases of 3%.
- Negotiated a 5-year management agreement resulting in annual wage increases of 4.2%.

OTHER EXPERIENCE

- Negotiated a licensing agreement with Take Two Interactive, placing the main theme song of the video game NBA 2K12 (Sold over 7.5 million units worldwide).
- Negotiated a publishing agreement with Sterling and Ross, Cambridge House Press for the biography *Theo-logy: How a Boy Wonder Led the Red Sox to the Promised Land* by John Frascella,(Amazon Best Seller).
- Assisted in placing the song "King of the Clouds" on Panic! at the Disco's album Pray For The Wicked (RIAA Platinum).
- Manager of platinum record producer Alex "AK" Kresovich (Panic! at the Disco, Cee Lo Green).
- Manger of Jeff Foote-Center-New Orleans Hornets/BC Zalgiris/Springfield Armor.

EDUCATION

Maurice A Deane School of Law at Hofstra University, Hempstead, NY
Juris Doctor, May 2015

Honors and Activities: Dean's List • Sports & Entertainment Law Society • Business Law Society • Dispute Resolution Society • Cuba Field Study Program

Cornell University- School of Industrial & Labor Relations, Ithaca, NY
B.S. in Industrial and Labor Relations, May 2009

Honors and Activities: Graduated with Honors • Dean's List • Division 1 Men's Varsity Track • ILR Sports Business Society • Cornell Sports Marketing Club • Crowned Prince Music Charity

LICENSE & AFFILIATIONS

• New York Bar • U.S. District Court, Eastern District of New York • U.S. District Court, Southern District of New York
• New York State Bar Association • Nassau County Bar Association

Hofstra University School of Law
Cumulative GPA: 3.38

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Analysis, Writing & Reasoning I		B	2.0	
Torts		B	4.0	
Criminal Law		B	3.0	
Civil Procedure I		C+	3.0	
Contracts I		B	3.0	

Death in family. My grandfather passed away over the fall study break just prior finals. While I requested an extension of time with which to take my exams, the law school declined my request. As such, I was forced to take my final exams without any chance to study or adequately prepare.

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II		A-	2.0	
Transnational Law		B+	2.0	
Intro. to Administrative Law		A-	1.0	
Property		B+	4.0	
Contracts II		B+	3.0	
Legal Analysis, Writing & Reasoning II		B+	3.0	

Leave of absence. My sister passed away two (2) weeks into my second semester of law school, Spring 2012. As such, I was required to take a one (1) year leave of absence and restart my second semester of law school in the Spring 2013.

Summer I 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Pretrial Skills		B+	3.0	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Ethics and Malpractice		A-	3.0	
Criminal Procedure I		B	4.0	
Constitutional Law I		B+	3.0	
Evidence		B+	4.0	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Organizations		A-	4.0	
Comparative Family Law		A	1.0	
Constitutional Law II		B+	3.0	
Alternatives to Litigation		B+	3.0	

Family Law	B+	3.0

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Entertainment Law		A-	2.0	
Legal Interviewing, Counseling, & Negotiation		A	3.0	
Real Time Lawyering: The TRO		Pass	1.0	
Nuts and Bolts of Practicing Law		B+	2.0	
Federal Income Taxation of Individuals		A	4.0	
Sports Law		A	2.0	

Deans List.

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Comparative Refugee & Asylum Law		B	1.0	
Perspectives: Legal Writing and Analysis		B+	3.0	
Wills, Trusts, and Estates		A-	4.0	
Select Problems in New York Civil Practice		B+	3.0	
Independent Study		A	2.0	

Deans List.

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
WASHINGTON

WILLIAM S. GREENBERG
UNITED STATES JUDGE

March 15, 2023

Dear Christopher,

Please consider this a letter of reference which you may use for any professional purpose you deem appropriate. My recommendation is based upon your excellent, efficient, and consummate dedication while serving as a Law Clerk in my chambers.

Your academic and legal careers demonstrated your extreme hard work and ambition. In viewing both professional experiences of your ability and skills, you more than met my expectations as a law clerk and lawyer. The language of our statutory scheme, and the requirements of arcane federal regulations in this unique area of the law, presented challenges which you readily overcame. You have a high degree of intellectual honesty and extraordinary efficiency to see that your position is correctly and completely stated. Specifically, you were timely and complete in all assignments given to you by me, and my Senior Law Clerk. You have served as my trusted agent on several occasions when my Senior Law Clerk was out of the office. Your work was excellent, and I intend to make use of it in future opinions which I author on behalf of the Court.

You also fully understood that as a law clerk, all intellectual exchange must give way to the ultimate decision maker. These are precisely the qualities that I admired as a practicing attorney for forty-five years, a member of the Reserve Components of the Army for twenty-seven years, and as a federal appellate judge for the past ten years. You are an exemplar, second to none, of a lawyer who will meet every intellectual challenge, deal with it forcefully, yet recognize the responsibilities of command.

Accordingly, I continue to wish you well in your future career and recommend you highly for any position you desire to seek beyond this Court. Please feel free to have prospective employers contact me directly for any further endorsement.

Most cordially,

William S. Greenberg
United States Judge
Brigadier General
United States Army (Retired)

Christopher Pearsall
2891 Clark Avenue
Oceanside, NY 11572

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
WASHINGTON

WILLIAM S. GREENBERG
UNITED STATES JUDGE

March 15, 2023

Dear Christopher,

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Accordingly, I continue to wish you well in your future career and recommend you highly for any position you desire to seek beyond this Court. Please feel free to have prospective employers contact me directly for any further endorsement.

Most cordially,

William S. Greenberg
United States Judge
Brigadier General
United States Army (Retired)

Christopher Pearsall
2891 Clark Avenue
Oceanside, NY 11572

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. [redacted]

[redacted], APPELLANT,

V.

[redacted],
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before [redacted], *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

[redacted], *Judge*: U.S. Marine Corps veteran [redacted] appeals through counsel a September 9, 2021, Board of Veterans' Appeals (Board) decision that denied a motion for reversal or revision on the basis of clear and unmistakable error (CUE) in a September 21, 2006, Board decision that denied service connection for post-traumatic stress disorder (PTSD). Record (R.) at 5-14. The appellant argues that the Board (1) clearly erred in its 2006 decision when it determined that the appellant had not engaged in combat and a manifestly different result would have resulted had the Board determined that the appellant engaged in combat; (2) provided an inadequate statement of reasons or bases for concluding that the September 2006 Board decision did not contain CUE; and (3) failed to comply with its own remand instructions rendering the September 2006 Board decision nonfinal. Appellant's Brief at 7-16. For the following reason, the Court will set aside the September 2021 Board decision and remand the matter for readjudication.

I.

The Veterans Administration was established in 1930 when Congress consolidated the Bureau of Pensions, the National Home for Disabled Volunteer Soldiers, and the U.S. Veterans' Bureau into one agency. Act of July 3, 1930, ch. 863, 46 Stat. 1016. This Court was created with

the enactment of the Veterans' Judicial Review Act (VJRA) in 1988. *See* Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). Before the VJRA, for nearly 60 years VA rules, regulations, and decisions lived in "splendid isolation," generally unconstrained by judicial review. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994) (Souter, J.).

Yet, the creation of a special court solely for veterans is consistent with congressional intent as old as the Republic. Congress first sought judicial assistance in affording veterans relief when it adopted the Invalid Pensions Act of 1792, which provided "for the settlement of the claims of widows and orphans . . . and to regulate the claims to invalid pensions," for those injured during the Revolutionary War. Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)). The act, though magnanimous, curtailed the power of the judiciary, by providing the Secretary of War the ability to withhold favorable determinations to claimants by circuit courts if the Secretary believed that the circuit court had erred in favor of the soldier based on "suspected imposition or mistake." *See id*.

Chief Justice John Jay[1] wrote a letter[2] to President George Washington on behalf of the Circuit Court for the District of New York[3] acknowledging that "the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress." *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792). Jay also noted that "judges

[1] John Jay served as the first Secretary of State of the United States on an interim basis. II DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 872 (4th ed. 2004). Although a large contributor to early U.S. foreign policy, Jay turned down the opportunity to assume this position full time. *Id*. at 872, 916. Instead, he accepted a nomination from President Washington to become the first Chief Justice of the Supreme Court on the day the position was created by the Judiciary Act of 1789. *Id*. Jay resigned his position in 1795 to become the second Governor of New York. *Id*. He was nominated to become Chief Justice of the Supreme Court again in December 1800, but he declined the appointment.

[2] The Supreme Court never decided *Hayburn's Case*. *See* 2 U.S. (2 Dall.) 409, 409 (1792). The case was held over under advisement until the Court's next session and Congress adopted the Invalid Pensions Act of 1793, which required the Secretary of War, in conjunction with the Attorney General, to "take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States." Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793). *Hayburn's Case* has often been cited as an example of judicial restraint, *see, e.g.*, *Tutun v. United States*, 270 U.S. 568 (1926), but Supreme Court historian Maeva Marcus has argued persuasively to the contrary. *See* Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527. After all, Jay's letter included by Dallas, the Court Reporter, in a note accompanying the decision to hold the matter under advisement, is nothing more than an advisory opinion that compelled Congress to change the law in order to make the judiciary the final voice on the review of a Revolutionary War veteran's right to pension benefits. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.

[3] At this time, each Justice of the Supreme Court also served on circuit courts, a practice known as circuit riding. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015).

desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature." *Id*.

This desire to effect congressional intent favorable to veterans has echoed throughout the Supreme Court's decisions on matters that emanated from our Court. *See Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S. Ct. 1696, 1709 (2009) (Souter, J., dissenting) ("Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"); s*ee also Henderson v. Shinseki*, 562 U.S. 428, 440, 131 S. Ct. 1197, 1205 (2011) (declaring that congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," and emphasizing that the provision "was enacted as part of the VJRA [because] that legislation was decidedly favorable to the veteran"). In the words of Justice Paterson, "[j]udges may die, and courts be at an end; but justice still lives, and, though she may sleep for a while, will eventually awake, and must be satisfied." *Penhallow v. Doane's Adm'r*, 3 U.S. 54, 79 (1795).

II.

Justice Alito[4] observed in *Henderson v. Shinseki* that our Court's scope of review is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. at 432 n.2 (2011); *see* 38 U.S.C. § 7261. "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. The statutory command that a single judge[5] may issue a binding decision is "unambiguous, unequivocal, and unlimited," *see Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). The Court's practice of treating panel decisions as "precedential" is unnecessary, particularly since the Court's adoption of class action litigation. *See Wolfe v. Wilkie*, 32 Vet.App.

[4] Justice Alito was born in Trenton, New Jersey. SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx (last visited Mar. 4, 2020). He began his career as a law clerk, then became assistant U.S. attorney for the district of New Jersey before assuming multiple positions at the Department of Justice. *Id*. He then became a U.S. attorney for the district of New Jersey. *Id*. Before his nomination for the Supreme Court, he spent 16 years as a judge on the U.S. Court of Appeals for the Third Circuit. *Id*. In 2005, President George W. Bush chose Alito to replace retiring Supreme Court Justice Sandra Day O'Connor. *Id*.

[5] From 1989 to 1993, West (the publisher of this Court's decisions) published this Court's single-judge decisions in tables in hard-bound volumes of West's *Veterans Appeals Reporter*. Since 1993, West has published this Court's single-judge decisions electronically only. I believe the Court should publish all its decisions in print form. *See, e.g., Passaic Cty. Bar Ass'n v. Hughes*, 401 U.S. 1003 (1971).

1 (2019) (order), *rev'd sub nom. Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022). We cite these decisions from our Court merely for their guidance and persuasive value.

III.

The appellant served on active duty in the U.S. Marine Corps from April 1986 to December 1988 as a rifleman, R. at 2079 (DD Form 214), including service in the Persian Gulf. R. at 4898. The appellant earned many medals and commendations for his service, including an Armed Forces Expeditionary Medal, a Sea Service Deployment Ribbon, and a Sharpshooter-Grade Marksmanship Qualification Badge with the rifle. R. at 2079.

The appellant's service records provide, under "Combat History and Expeditions," that he participated in contingency operations in the Arabian Gulf and served in Operation Earnest Will in December 1987. R. at 5330. Deck logs from the U.S.S. *Okinawa* report that as a result of an Iraqi aircraft threat and on entering the Silkworm missile envelope, the ship went to general quarters at least twice while the appellant was aboard. R. at 2224, 2192.

IV.

In August 1993, the appellant filed a claim for service connection for several conditions, including PTSD. R. at 5448-54. He claimed that while he was serving in the Persian Gulf and his ship was going through the Strait of Hormuz, the ship went to general quarters after an Iraqi jet launched missiles directly over the ship. R. at 5455. He also alleged that while in a raft he was chased by an Iraqi gun boat. *Id*. In September 1994, VA denied service connection for a chronic psychiatric disorder including PTSD and chronic undifferentiated schizophrenia. R. at 5276-78. VA determined that the appellant did not have a confirmed diagnosis of PTSD. R. at 5277. The appellant did not appeal this decision and it became final.

In February 1996, the appellant filed to reopen his PTSD claim. R. at 5265-66. In August 1996, he underwent a VA examination, during which he described several incidents during service that he claimed caused his PTSD, including (1) seeing two children being shot while he was on patrol in the Philippines across from Subic Bay in October 1987; (2) serving aboard a mine sweeping ship in the Persian Gulf and being under a constant threat of running into sea mines; (3) seeing tanker ships being shot and blown up by Chinese Silkworm missiles; (4) being stationed on a ship that an Iraqi ship fired upon; and (5) being chased by an Iraqi gun boat while he patrolling

in a zodiac boat. R. at 5167. The examiner diagnosed the appellant with chronic PTSD. R. at 5168. In October 1996, the appellant testified before the regional office (RO) that while stationed in the Persian Gulf, he feared that he was going to be killed at any time because his ship was continually at general quarters. R. at 5138-39.

In May 1999, the Board reopened the appellant's PTSD claim, R. at 5043-57, and remanded the matter for the RO to verify the appellant's claimed stressors. R. at 5053-54. In June 2003, the appellant stated that while he was aboard the U.S.S. *Okinawa*, the ship was at general quarters for extended periods and he spent many nights "staring at the blinking red light and listening to the alarm while awaiting our death in our section of the ship." R. at 4489.

In September 2006, the Board denied service connection for PTSD. R. at 4046-67. The Board concluded that the appellant had not engaged in combat, that his in-service stressors were not verified, and that his PTSD was not based on verified stressors. R. at 4048. The Board considered the appellant's lay statements, R. at 4056, 4058; a December 2001 buddy statement from the appellant's team leader aboard the U.S.S. *Okinawa*, who described the dangers they experienced, R. at 4056; and the August 1996 VA psychiatric examiner's opinion diagnosing the appellant with PTSD related to service. R. at 4058. Yet, the Board rejected the appellant's own reports of in-service stressors, finding them unreliable because "there is no independent evidence to corroborate the reported combat and noncombat stressors." R. at 4060. The appellant did not appeal this decision and it became final.

In July 2011, the appellant again filed for service connection for PTSD. R. at 4022. In April 2014, the RO granted service connection for PTSD with secondary polysubstance dependence and psychotic disorder (partially induced by polysubstance dependence), with a 100% disability rating, effective June 29, 2011. R. at 2889-92.

In October 2016, the appellant filed a motion with the Board seeking reversal or revision on the basis of CUE of the September 2006 Board decision, alleging that the Board (1) clearly erred when it determined that the appellant did not engage in combat, and (2) failed to comply with the with its July 2001 remand order. R. at 708-12. In July 2019, the Board denied the appellant's CUE motion. R. at 656-64. In May 2021, the Court set aside the July 2019 Board decision and remanded the matter because the Board failed to consider potentially favorable evidence that the appellant served in combat, specifically, the U.S.S. *Okinawa* deck logs that

established that general quarters were sounded at least three times while the appellant was onboard. R. at 69-72.

V.

In September 2021, the Board denied a motion for reversal or revision on the basis of CUE in a September 21, 2006, Board decision that had denied service connection for PTSD. R. at 5-14. In denying the motion, the Board considered as evidence of combat participation, the appellant's argument that his service records contained a page titled "Combat History and Expeditions" that stated the appellant had participated in contingency operations in the Arabian Gulf from October 6, 1987, to April 6, 1988, and in Operation Earnest Will from November 24, 1987, to February 18, 1988. R. at 11. Yet the Board concluded that "this evidence indicates that [the appellant] participated in specific operations, which may have involved combat for some participants, which is not clear and unmistakable evidence that [the appellant] himself actually engaged in combat." *Id*. The Board also acknowledged that the September 2006 Board decision had not considered evidence that the U.S.S. *Okinawa* went to general quarters at least three times while the appellant was aboard, R. at 11-12, but the Board concluded that this evidence would not have manifestly changed the outcome of the September 2006 Board decision because in the 2006 decision the Board did not find that the appellant "personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality, as required for a determination that [the appellant] participated in combat." R. at 12 (citing VA Gen. Couns. Prec. 12-1999 ((Oct. 18, 1999) [hereinafter G.C. Prec. 12-1999]). This appeal ensued.

VI.

"A claimant may file a request to the Board to reverse or revise a prior Board decision on the grounds that the prior decision contains clear and unmistakable error." *Hillyard v. Shinseki*, 24 Vet. App. 343, 349 (2010); 38 U.S.C. § 7111(a). Such a request may be made at anytime after the Board decision is issued, is submitted to the Board directly, and shall be decided by the Board on the merits. 38 U.S.C. § 7111(d)-(e).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). To establish

clear and unmistakable error a claimant must satisfy three prongs. First, either (1) the correct facts in, or constructively in, the record were not before the adjudicator; or (2) "the statutory or regulatory provisions in existence at the time were incorrectly applied." *See Damrel v. Brown*, 6 Vet. App. 242, 245 (1992). Second, "the alleged error must be undebatable, not merely a disagreement as to how the facts were weighed or evaluated." *Hillyard*, 24 Vet. App. at 349 (internal quotations omitted). Third, the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked on the basis of the clear and unmistakable error at the time that decision was rendered. *Id*.

"In reviewing Board decisions evaluating allegations of CUE in prior final decisions, the Court cannot conduct a plenary review of the merits of the original decision." *Simmons v. Wilkie*, 30 Vet.App. 267, 274 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020) (internal quotations marks omitted); *Andrews v. Principi*, 18 Vet.App. 177, 181 (2004), *aff'd sub nom. Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005). Rather, the Court's overall review is limited to determining whether the Board's conclusion finding no CUE was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," *See* 38 U.S.C. § 7261(a)(3)(A); and whether the Board decision contained a statement of "the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record." 38 U.S.C. § 7104(d)(1). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. *See Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) (Matthews, J.).

VA's General Counsel defines "engaged in combat with the enemy" generally as requiring that a veteran "have taken part in a fight or encounter with a military foe or hostile unit or instrumentality," and that this definition does not apply to "veterans who served in a general 'combat area' or 'combat zone' but did not themselves engage in combat with the enemy." G.C. Prec. 12-1999, at 3. More specifically, "a statement in a veteran's service personnel records that the veteran participated in certain military campaigns or operations … is [in]sufficient in itself to establish engagement in combat," and "further evidence of actual or threatened exposure to hostile fire or some similar type of event or threat is required." *Id*. at 7.

VII.

The Court concludes that the Board provided an inadequate statement of reasons for bases for denying the appellant's motion for reversal or revision on the basis of CUE of a September 21, 2006, Board decision that denied service connection for PTSD. 38 U.S.C. § 7104(d)(1). In the September 2021 decision on appeal, the Board noted that the September 2006 Board decision had failed to consider that the U.S.S. *Okinawa* went to general quarters at least three times while the appellant served aboard, R. at 11-12, but the Board concluded that this evidence would not have manifestly changed the outcome of the September 2006 Board decision because this evidence did not indicate that the appellant had "personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality, as required for a determination that [the appellant] participated in combat." R. at 12 (citing G.C. Prec. 12-1999).

Yet it appears that the Board misinterpreted and considered the wrong part of the VA General Counsel precedential opinion. The part the Board cited clarifies that merely being in a combat area or combat zone is insufficient for a combat finding and that the service member must have "personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality." G.C. Prec. 12-1999, at 3. But the relevant part of the precedential opinion appears instead to be where the General Counsel answered no to the question whether "a statement in a veteran's service personnel records that the veteran participated in certain military campaigns or operations … is sufficient in itself to establish engagement in combat, or whether further evidence of actual or threatened exposure to hostile fire or some similar type of event or threat is required." G.C. Prec. 12-1999, at 7. "General quarters" is defined as "a condition of maximum readiness of a warship for action with all hands at battle stations."[6] Therefore, though the records that the appellant participated in contingency operations in the Arabian Gulf and served in Operation Earnest Will are not sufficient to meet the definition of "combat" as established by the VA General Counsel precedent opinion, it is unclear why sounding general quarters would not undebatably trigger combat status for every person aboard the ship based on "a threatened exposure to hostile fire." G.C. Prec. 12-1999, at 7. Remand is required for the Board to provide an adequate statement of reasons or bases for its decision on whether the September 2006 Board decision contained CUE. 38 U.S.C. § 7104(d)(1).

[6] *General quarters*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY, https://unabridged.merriam-webster.com/unabridged/general%20quarters (last visited Feb. 3, 2023).

VIII.

For the foregoing reason, the September 9, 2021, Board decision is SET ASIDE, and the matter is REMANDED for reajudication.

DATED: [redacted]

Copies to:

[redacted], Esq.

[redacted] (027)

Applicant Details

First Name	**James**
Last Name	**Pezzullo**
Citizenship Status	**U. S. Citizen**
Email Address	**jp2548@cornell.edu**
Address	**Address** Street **131 E Green St, Apt. 210** City **Ithaca** State/Territory **New York** Zip **14850** Country **United States**
Contact Phone Number	**7322524322**

Applicant Education

BA/BS From	**Syracuse University**
Date of BA/BS	**June 2020**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 13, 2023**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Public Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Langan First Year Competition 2021** **Cuccia Cup 2021** **New York City Bar Moot 2021**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Blume, John
jb94@cornell.edu
607-255-1030
LeClercq, Desirée
dg698@cornell.edu
Rachlinski, Jeffrey
jjr7@cornell.edu
607-255-5878

This applicant has certified that all data entered in this profile and any application documents are true and correct.

James R. Pezzullo
131 E Green Street, Apt. 210
Ithaca, NY 14850

June 10, 2023

The Honorable Kiyo A. Matsumoto
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room S905
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am writing to apply for a clerkship in your chambers for the 2025-26 term. I earned my J.D. from Cornell Law School in May, and I will have two years of litigation experience at White & Case by the time the term begins. I am open to serving in your chambers in the 2026-27 term as well.

I grew up in New Jersey and my fiancée and I will both be working in New York City starting this fall. My brother lives in Brooklyn and plans to stay for a long time to come. I also plan on staying, practicing, and raising a family in New York.

My experiences outside the classroom have prepared me well for a clerkship. I was an intern for Judge Frederick J. Scullin in the Northern District of New York, so I have seen firsthand the work that goes on in chambers. I served on the *Cornell Journal of Law and Public Policy*, facilitated moot court and mock trial competitions, and worked in three different clinical programs at Cornell.

Attached you will find my resume, writing sample, and law school grade report. Letters of recommendation from Professors John Blume, Desirée LeClercq, and Jeffrey Rachlinski are also enclosed.

Please do not hesitate to reach out if you need additional information or documentation from me. I appreciate your consideration of my application materials and my sincere desire to work in your chambers.

Sincerely,

James Pezzullo

James R. Pezzullo

JAMES R. PEZZULLO

131 E Green Street, Apt. 210, Ithaca, NY 14850 | jp2548@cornell.edu | 732-252-4322

EDUCATION

Cornell Law School **Ithaca, NY**
Juris Doctor May 2023
GPA: 3.482
Honors: Dean's List | 2021 Langfan Family First Year Moot Court Competition, Round of 16 | 2021 New York City Bar Moot Court Competition, Regional Quarterfinalist
Journal: *Cornell Journal of Law and Public Policy*, Programming Director
Activities: Moot Court Board, Vice Chancellor of Internal Competitions | Mock Trial, Treasurer | Cornell Law Students Association, Secretary | Christian Legal Society, Co-President

Syracuse University, Newhouse School of Public Communications **Syracuse, NY**
Bachelor of Science, *cum laude* June 2020
Major: Public Relations
Minor: Political Science

EXPERIENCE

White & Case LLP **New York, NY**
Associate Anticipated October 2023

Cornell University School of Industrial and Labor Relations, Professor Desirée LeClercq **Ithaca, NY**
Research Assistant August 2021 – May 2023
Assisted with sourcing, proving, and drafting articles on administrative and labor law. Researched case law and scholarly literature. Planned and conducted quantitative research. Reviewed and edited drafts of proposals.

New York State Office of the Attorney General **Syracuse, NY**
Practicum Student Extern January 2023 – May 2023
Conducted legal research and drafted documents including memoranda, motions, and post-trial briefs. Collaborated with assistant attorneys general to defend the State of New York in the New York Court of Claims.

White & Case LLP **New York, NY**
Summer Associate May 2022 – July 2022
Conducted research for motion practice and appellate briefs in contracts litigation, antitrust disputes, and bankruptcies. Drafted memoranda to keep clients and colleagues apprised of developments in the law.

U.S. District Court for the Northern District of New York, Senior Judge Frederick J. Scullin **Syracuse, NY**
Judicial Intern June 2021 – July 2021
Conducted research and drafted memoranda on evidentiary issues and judicial review of administrative actions in collaboration with clerks. Observed trials, sentencings, and other hearings. Shadowed daily activities in chambers.

Institute for Veterans and Military Families **Syracuse, NY**
Fundraising Communications Assistant September 2018 – August 2020
Managed grant applications & reporting for funders of a nationwide charity serving American veterans. Reviewed and revised funding agreements and other partnership covenants.

American Battlefield Trust **Washington, DC**
Digital Media Intern June 2019 – July 2019
Wrote and edited social media copy, messages to donors, and video scripts. Generated a variety of digital content across multiple platforms for the nation's largest battlefield preservation society.

INTERESTS

Trained singer, untrained weightlifter, and amateur genealogist. Cat dad, sports fan, and avid reader. Can be found hiking Ithaca's gorges, exploring local breweries and wineries, or playing basketball.

Cornell Law School - Grade Report - 06/07/2023

James Pezzullo

JD, Class of 2023

Course	Title	Instructor(s)	Credits	Grade

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 5001.5	Civil Procedure	Rachlinski	3.0	A-
LAW 5021.3	Constitutional Law	Dorf	4.0	A
LAW 5041.2	Contracts	Anker	4.0	B+
LAW 5081.4	Lawyering	Fongyee Whelan	2.0	B+
LAW 5151.2	Torts	Heise	3.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.6868
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.6868

^ Dean's List

Spring 2021 (2/2/2021 - 5/7/2021)

LAW 5001.1	Civil Procedure	Clermont	3.0	B+
LAW 5061.1	Criminal Law	Corn	3.0	B-
LAW 5081.4	Lawyering	Fongyee Whelan	2.0	B
LAW 5121.2	Property	Sherwin	4.0	B+
LAW 6011.1	Administrative Law	Rogers	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.2220
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.4619

Fall 2021 (8/24/2021 - 12/3/2021)

LAW 6401.1	Evidence	Colb	4.0	B
LAW 6861.603	Supervised Teaching	Hans/Rachlinski	2.0	SX
LAW 6921.1	Trial Advocacy	Weyble	5.0	B+
LAW 7178.101	Moral Foundations of Anti-Discrimination	Marmor	3.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	12.0	12.0	3.3875
Cumulative	45.0	45.0	45.0	45.0	43.0	43.0	3.4411

Spring 2022 (1/25/2022 - 5/2/2022)

LAW 6471.1	Health Law	Underhill	3.0	A-
LAW 6569.1	Introduction to Depositions	Fongyee Whelan	2.0	SX
LAW 6641.1	Professional Responsibility	Atiq	3.0	A-
LAW 7295.101	Global Labor and Employment Law	Sander	3.0	A-
LAW 7867.301	First Amendment Law Clinic I	Carter/Jackson/Murray	4.0	B+

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	13.0	13.0	3.5653
Cumulative	60.0	60.0	60.0	60.0	56.0	56.0	3.4700

Fall 2022 (8/22/2022 - 12/16/2022)

LAW 6441.1	Federal Income Taxation	Wilking	3.0	A-
LAW 7260.101	Federal Appellate Practice	Blume/Wesley	4.0	SX
LAW 7854.301	Tenants Advocacy Practicum I	Niebel	3.0	SX
LAW 7868.301	First Amendment Law Clinic 2	Hans/Jackson/Murray/Neitzey	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	6.0	6.0	3.6700

Cumulative	73.0	73.0	73.0	73.0	62.0	62.0	3.4893

Winter 2023 (1/15/2023 - 1/22/2023)

LAW 6923.1	Intensive Trial Advocacy [WINTER OFFERING, 1/15-22/23]	Heiden	3.0	B+

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	3.0	3.0	3.0	3.0	3.0	3.0	3.3300
Cumulative	76.0	76.0	76.0	76.0	65.0	65.0	3.4820

Spring 2023 (1/23/2023 - 5/16/2023)

LAW 6431.1	Federal Courts	Gardner	4.0	S
LAW 6455.101	Constitutional Remedies	Keenan	3.0	S
LAW 7925.301	New York Attorney General Practicum 1	Callery/Grossman/Sutton	6.0	SX
PE 1150.1	Ballroom Dancing	Sayers	0.0	SX

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	0.0	0.0	N/A
Cumulative	89.0	89.0	89.0	89.0	65.0	65.0	3.4820

Total Hours Earned: 89

Received JD on 05/28/2023

Cornell Law School

JOHN H. BLUME
Samuel F. Leibowitz Professor of Trial Techniques and Director of the Cornell Death Penalty Project

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June 11, 2023

The Honorable Kiyo Matsumoto
United States District Court
for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: James R. Pezzullo

Dear Judge Matsumoto:

It is my distinct pleasure to recommend that you interview and hire James Pezzullo as one of your law clerks. He is a very good student, and I recommend him highly.

James was a student during the fall of 2022 in Federal Appellate Practice, a class that I teach with the Honorable Richard Wesley of the United States Court of Appeals for the Second Circuit.

In Federal Appellate Practice, James was one of the top performers. Students in the class are required to argue two pending cases on the Supreme Court's docket as their final project. His oral arguments and brief were very good. I will also say that James improved significantly between the first and second argument. This indicated to me that he accepted and absorbed the feedback to improve his legal writing that Judge Wesley and I offered. It was quite good mind you, but it is an area where all our students can improve. Similarly with our oral argument advice, he was grateful and open to the feedback (which is not always the case with students).

Overall, James has been a good, but not excellent student. Please do not let that prevent you from considering his application. His GPA has improved the last three semesters and it is not uncommon, even for very bright students, to take a while to get on track with what is required on a law school exam. He is also very involved in our Moot Court program serving on the Executive Board as the Vice Chancellor for Internal Competitions and with the Journal of Law and Public Policy as its Program Director.

James is a very even-keeled person. He works efficiently in a collaborative setting. He also has a keen wit and delightful sense of humor. I very much enjoyed getting to know him in Federal Appellate Practice. James will be an asset in any chambers and will get along well with his co-clerks and the administrative staff.

James wants to clerk because he finds the law both personally and intellectually engaging and is seeking opportunities to improve his practical understanding of the law in action and his analytical and writing skills. He also values mentors, and he would thrive in the rigorous and critical intellectual environment of your chambers, and you would, in my opinion, both be the better for it.

In sum, I recommend James highly.

Please do not hesitate to contact me if I can provide you with additional information.

Very truly yours,

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques
and Director of the Cornell Death Penalty Project

Cornell Law School

Desirée LeClercq
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June 11, 2023

The Honorable Kiyo Matsumoto
United States District Court
for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is with great pleasure that I recommend Mr. James Pezzullo selection to your clerkship program. I have worked closely with James over the past two years and am well-positioned to write on behalf of his professional and interpersonal skills. As my research assistant, James proved self-motivated, attentive to detail, adept at legal research, and a fun co-worker. James will make for a tremendous contribution to your program.

James was brought to my attention by other members of the Cornell law faculty in response to my requests for an RA. They were impressed with James' attention to detail in class, particularly on matters related to civil procedure and administrative law. Over the course of two years, James has confirmed their instincts. He is consistent, reliable, and had provided critical assistance across four different law review articles dealing with U.S. and international labor law, U.S. administrative law across circuits and jurisdictions, and U.S. trade policy. James is not afraid of admitting when he does not know something. While he was unfamiliar with many of these topics, he quickly came up to speed and offered valuable contributions concerning case law, secondary resources, and legal drafting.

When evaluating case law, James has an extraordinary ability to remain neutral and balanced. He often pointed out when my writing verged on the hyperbolic and did not shy away from pointing out opposing viewpoints. James clearly enjoys discussing the law and thinking through law and policy without getting weighed down by political ideology or pre-determined outcomes. His neutrality, instincts, and inquisitive approach saved me – undoubtedly – from my own preconceptions of justice and the law. I am confident that James will approach cases as a law clerk with the same balance and objectivity.

James is also incredibly punctual and self-motivated. Over the years and our numerous projects, James always carried out his responsibilities immediately. If he had questions, he raised them early and exhaustively. If James had a conflict with his academic demands, he communicated with me promptly and always managed my expectations about deliverables. James will undoubtedly apply his timeliness, communication, and multitasking skills to his clerking assignments.

My articles have benefitted tremendously from James' close editorial eye and natural writing abilities. He often caught errors or issues I overlooked, and his proposed drafting was consistently concise and powerful. James' drafting skills will significantly contribute to draft opinions.

Last, but certainly not least, James is a lot of fun to work with. He has a great sense of humor, does not take criticism personally, and remains even-keeled even while under stress. I have enjoyed working with James on various articles and projects immensely. I am confident his easy-going demeanor will render him a crucial asset, both to his judge and colleagues.

James is driven, passionate about the law, and eager to apply his strong writing, research, communication, and interpersonal skills to your chamber. I am confident that he will make a significant contribution to the law and your court. I would be happy to provide further information concerning his candidacy for your program.

Sincerely,

Desirée LeClercq
Assistant Professor, International Labor Law

Cornell Law School

JEFFREY J. RACHLINSKI
Henry Allen Mark Professor of Law

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June 11, 2023

The Honorable Kiyo Matsumoto
United States District Court
For the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in support of Mr. James Pezzullo's application for a judicial clerkship with you. He was enrolled in my Civil Procedure class in the fall semester of his first year and I hired him as a teaching assistant for an undergraduate class. I work very closely with my teaching assistants and so I know Mr. Pezzullo well. I highly recommend him as a judicial clerk.

Mr. Pezzullo is a good student. I probably called on him a half-dozen times and he invariably knew the materials well. Furthermore, he provided articulate, unpretentious responses that advanced the understanding of everyone in class. He has a quick, engaging legal mind. Although his grades are good, it is surprising to me that his transcript is not stronger. He has excellent analytical skills that will serve him well in practice. I have also read some of his writing. He has a great ability to break down a legal problem and explain while advocating.

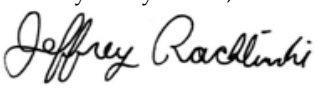
Mr. Pezzullo describes himself as "unflappable" and I can certainly confirm that. He carries himself with a calm demeanor. His experiences growing up might have much to do with this. When he was a teenager, a house fire destroyed his family's home. Shortly thereafter, his father was diagnosed with cancer. He had to grow up quickly to help care for him and his brothers. He is not humorless and somber; in fact, he is incredibly witty. But he knows when to be serious and how to handle himself under pressure. His experiences have made him wise for his years and given him a sense of purpose, determination, and grit. He is one of those rare students who has told me he wants eventually to become a judge. Although he obviously needs much more experience as a lawyer, his character and maturity certainly qualify him for the position.

Perhaps the highest praise I can give Mr. Pezzullo is that I hired him myself as a teaching assistant for a large undergraduate class. He did an excellent job. He gave individual attention to every one of the twenty students in his section. He was proactive

with them when they got behind on work and truly wanted each one of them to succeed. I tell my teaching assistants that they should think of the students in their section as their flock and that they should act as a shepherd that keeps them from getting lost. Most of the teaching assistants probably roll their eyes at this, but Mr. Pezzullo took to it. He truly displayed his professionalism, maturity, and organizational skills and made my life a lot easier.

In short, I recommend Mr. Pezzullo highly to you. He has an excellent career head of him. He will both be an asset to your office and a credit to you afterwards in his career. Please do not hesitate to contact me if I can be of any further assistance.

Very Truly Yours,



Jeffrey J. Rachlinski
Henry Allen Mark Professor of Law

I. MR. ESCOFFIER CANNOT BENEFIT FROM THE PRISON MAILBOX RULE AS HE IS REPRESENTED BY COUNSEL AND FAILED TO COMPLY WITH THE RULE.

When an inmate lacks counsel for the entire period for filing an appeal, they are "in reality . . . reduced to *pro se* status." *Maples v. Thomas,* 565 U.S. 266, 289 (2012). Multiple circuit courts have found that availability of counsel for a portion of the relevant period negates this reduction to *pro se* status. *Gibbons v. United States*, 317 F.3d 852, 855 (8th Cir. 2003) (citing *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984)). The Ninth Circuit has held that the incapacitation of a specific attorney in a multi-attorney organization is irrelevant. *Meza v. Washington State Dep't of Soc. & Health Servs.*, 683 F.2d 314, 315 (9th Cir. 1982) ("several other attorneys worked in [counsel for petitioner's] office . . . the notice of appeal is a simple, one-page document . . . the preparation of a notice of appeal is largely clerical"). The Supreme Court of Maine reached the same conclusion. *See Lane v. Williams*, 521 A.2d 706 (Me. 1987).

When a *pro se* inmate makes use of a prison's legal mail system to file a notice of appeal that notice is considered "filed" on the date it is deposited with prison authorities for mailing, even if it is received by the district court after the standard deadline to file such notice. *Houston v. Lack*, 487 U.S. 266, 270 (1988); FED. R. APP. P. 4(c). Several circuit courts have found that the rule applies exclusively to *pro se* inmates and not those represented by counsel. *Cretacci v. Call*, 988 F.3d 860, 866 (6th Cir. 2021), *cert. denied*, No. 21-221, 2021 U.S. LEXIS 5267 (U.S., October 18, 2021); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *Nichols v. Bowersox*,

172 F.3d 1068, 1074 (8th Cir. 1999) ("[t]he prison mailbox rule traditionally and appropriately applies only to *pro se* inmates"). Two circuits have extended this privilege to inmates represented by counsel in the context of criminal appeals. *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994); *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004).

The prison mailbox rule includes two requirements: first, the notice must be deposited in the institution's mail system on or before the last day for filing; second, the notice must be accompanied by a declaration or notarized statement setting out the date of deposit and stating that first-class postage has been prepaid, or there must be evidence that the notice was deposited on the asserted date and that first-class postage was prepaid. FED. R. APP. P. 4(c). If an institution has a legal mail system, the inmate must use that system in order to reap the benefits of the prison mailbox rule. *Id.* Multiple circuit courts have held that it is not enough to deposit the notice in the mail and that the notice must be accompanied by the inmate's written attestation to depositing it. *See, e.g., Ingram v. Jones*, 507 F.3d 640, 644-45 (7th Cir. 2007); *Grady v. United States*, 269 F.3d 913, 918 (8th Cir. 2001). This requirement defeated the appeal in *Craig*, 368 F.3d at 740.

The burden of proving subject-matter jurisdiction rests with the party asserting such jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)). The federal appellate courts do not have subject-matter jurisdiction to hear appeals that are not filed within the time period prescribed by the Federal